124-5-87

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 960. 605

THE GREAT FALLS MANUFACTURING COMPANY, APPELLANT,

vs.

AUGUSTUS H. GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, ET. AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED AUGUST 17, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 960.

THE GREAT FALLS MANUFACTURING COMPANY, APPELLANT,

vs.

AUGUSTUS H. GARLAND, ATTORNEY GENERAL OF THE UNITED STATES, ET. AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	2	1
Order for hearing	22	20
Subpœna	23	20
Marshal's return	24	21
Affidavit of service of bill and order	25	21
Appearance for defendants	27	22
Affidavit of Garrett J. Lydecker	28	22
Letter from Attorney General, &c., January 20, 1885	32	24
Opinion of the court	40	36
Demurrer to bill	61	46
Joinder in demurrer	63	47
Stipulation as to submission on demurrer, &c.	63	47
Order to set cause for hearing on demurrer, &c.	64	47
Letter of clerk C. C. U. S. to solicitor general, November 10, 1885	65	48
solicitor general to clerk C. C. U. S. November 11, 1885	66	48
Judge Bond, July [illegible], 1886	67	49
B. F. Butler to Judge Bond, —— —— ——	68	49
Decree sustaining demurrer	69	49
Prayer for appeal	70	50
Order allowing appeal	70	50
Waiver of citation	71	50
Clerk's certificate	72	51

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 THE UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

At a circuit court of the United States for the fourth circuit in and for the district of Maryland begun and held at the city of Baltimore on the first Monday of April, being the fifth day of the same month, in the year of our Lord one thousand eight hundred and eighty-six—present, the Honorable Hugh L. Bond, circuit judge; Thomas J. Morris, judge of the Maryland district; Archibald Stirling, Jr., Esquire, attorney; John M. McClintock, Esquire, marshal; James W. Chew, clerk—among other, were the following proceedings, to wit:

THE GREAT FALLS MANUFACTURING COMPANY, Complainants,

vs.

AUGUSTUS H. GARLAND, Attorney General [of the] United States; William C. Endicott, Secretary of War [of the] United States; Garrett J. Lydecker, George B. Chittenden, and Samuel H. Chittenden, Defendants.

2 *Bill of Complaint. Filed 5 May,* 1885.

To the honorable the justices of the circuit court of the United States, sitting at Baltimore, within the district of Maryland, for the fourth judicial circuit:

The Great Falls Manufacturing Company, of the State of Virginia, and a citizen of said State, brings this its bill against Augustus H. Garland, of Arkansas, and a citizen thereof; William C. Endicott, of Massachusetts, and a citizen thereof; Garrett J. Lydecker, of the District of Columbia, and a citizen of the State of New Jersey; George B. Chittenden, a citizen of the United States and commorant in the State of Maryland, and Samuel H. Chittenden, a citizen of the United States and commorant in the State of Maryland. And thereupon your orator complains and says—

That the defendant, Augustus H. Garland, is the Attorney General of the United States; the defendant, William C. Endicott, is the Secretary of War of the United States; the defendant, Garrett J. Lydecker, is a major of engineers of the United States Army and is the engineer, under said Endicott, in charge of the dam and other structures and work, hereinafter more particularly described, now in process of erection on complainant's lands, as hereinafter set forth; the defendants, George B. Chittenden and Samuel H. Chittenden, are the contractors with the Secretary of War, for and on behalf of the United States, for the building of said dam on your complainant's lands across Conn's Island and across the Virginia channel of the Potomac river to the Virginia shore and other structures and works in connection therewith on said lands.

That said Great Falls Manufacturing Company, established by the laws of Virginia, domiciliated at the Great Falls of the Potomac, and a citizen of said State, was and is possessed in its demesne as of fee, of certain lands and water rights thereunto appertaining, as well in the State of Maryland as in the State of Virginia, known and described as follows: "Conn's Island," lying and being in the waters of the Poto-

mac river, in said Maryland and in said fall, extending up and down said river the distance of about one-half mile, northerly and southerly, bounded by a line commencing at the most northern point of said island, running thence easterly to the thread of the channel of said river between said Conn's Island and the Maryland shore of said river, thence southerly along the thread of said channel to a point
3 opposite to the southermost point of said island; thence westwardly to the western boundary of said Maryland, and thence along said boundary of said Maryland northerly as far as the northern point of said island, and thence easterly to said point of said island, with all the rights, easements, privileges of water, of fishery, use, and navigation thereunto appertaining and belonging, and that said company was and is possessed in its demesne as of fee, of certain other tracts of land lying and being in said Potomac river above said Conn's Island, being the several islands known as the "Cyclades," and all the rights, easements, and privileges of water, use, and navigation thereunto belonging.

And that said company was and is possessed in its demesne, as of fee, of a certain tract of land in Virginia known as the "Toulson tract," lying and being on the Potomac river, at said Great Falls, and described and bounded as follows: Commencing at the northeasterly corner thereof, at the western boundary of said Conn's Island; thence running southerly by said boundary of said Conn's Island and along the middle thread of said river to a point below said Great Falls; thence extending westerly about half a mile; thence northerly to a point opposite the point begun at, and thence easterly to the point begun at, containing one thousand acres, more or less, with all the easements, rights of water, use, navigation, privileges, and fisheries thereunto appertaining and belonging.

And your complainant further shows that the Potomac is a large and perennial stream of water, navigable by large vessels up to within twelve miles of said falls, and that said river flows past the District of Columbia, and the water flowing in said river at said Great Falls, being of great purity and 148 feet above the mean tide at Washington city, forms the best, most convenient, and almost the only supply of pure water for the capital of the United States, which will flow by its own weight, and without the cost of pumping, into the highest habitations of said District, thus furnishing an unlimited supply of water for domestic use and extinguishment of fires.

And your complainant further shows that the water of said river, at its lowest ordinary flow, runs about 1,065 cubic feet per second, falling as it runs over and by the lands of your petitioner more than seventy feet, and as the land of your petitioner last described is elevated land, rising up from the margin of said river above the highest flowage of freshets of said river, together with the proximity of said lands to the navigable waters of said river, make said falls one of the most eligible, convenient, desirable, and profitable powers for manufacturing purposes to be found in the country.

And your complainant is informed and believes, and therefore avers, that said water power would long since have been taken up and used for manufacturing purposes to the great income, profit, and ad-

vantage of your petitioner, for which use and purpose said property was obtained by your complainant more than thirty years since, had it not been for the unauthorized, unlawful, and oppressive act
4 of the officers, or persons claiming to be officers, of the United States, and claiming to act under the authority thereof, but without said authority, and who intruded themselves upon said lands of your complainant and took possession of parts thereof and seized upon and diverted large quantities of the waters thereof away from your complainant's said lands, and claimed and exercised the power to divert as much water as they chose to do from said lands of your complainant, so that your petitioner, as well as all other persons, were hindered and prevented from improving and using said water power, by building the proper dams, canals, waterways, mills, wheels, and structures to use the same, because of the uncertainty as to how much of said water could be diverted by said intruders, and because of the doubts thrown on the title of your complainant to said land by said intruders, and because of the fear that all men naturally have to enter into contest with the United States concerning matters wherein frequent and enormous wrongs and injuries may be inflicted by those acting in behalf of the United States and supported by its power and claiming authority, and where no trial by jury can be had to adjudicate and determine the rights of a citizen without great and inordinate expense.

And your complainant is further informed and believes, and therefore avers, that said intruders above mentioned, claiming to act by authority of the United States, did, in the year 1867, finish a certain dam from the Maryland shore to said Conn's Island, theretofore erected by them, which would divert an amount of water flowing in the channel between said Conn's Island and the Maryland shore, not to exceed two per cent. of the entire flow of said river as it ran and had been accustomed to run; and said intruders built an aqueduct to carry the water so diverted to certain reservoirs in said District of Columbia, there to be distributed for the use of said United States and the inhabitants of said District.

And your complainant further shows that being informed that Congress had appropriated money in large sums for the purpose of surveys of dams and aqueducts, to take water from said Great Falls for the purposes aforesaid, and that the control of the expenditure of said money had been placed under the Secretary of the Interior before any construction was begun, applied to said Secretary to take means to ascertain what compensation your complainant ought to have for such land and water rights as were proposed to be taken, if any, by the United States in a proper, just, and lawful manner, and thereupon said Secretary applied to the Legislature of the State of Maryland for an act, which was duly passed on the 3d day of May, 1853, entitled "An act giving the assent of the State of Maryland to such plan as may be adopted by the President of the United States for supplying the city of Washington with water," which act provided that if such plan should require water to be taken from some source within the limits of said State, consent is hereby given to the
5 United States to purchase such lands and to construct

such dams, reservoirs, and buildings and other works, and to exercise concurrently with the State of Maryland such jurisdiction over the same as may be necessary for the said service. It then provides that if the United States, through its agent, could not agree with the owners for the purchase of any land which may be required for the purposes aforesaid, yet it might be lawful for the United States to enter upon such lands after having made payment or tender of payment of the same at the valuation assessed in the manner hereinafter prescribed. It is thereupon provided that in the condemnation and assessment of said land, necessary for said purpose, the like proceedings shall be had in all respects as by existing laws are required for the condemnation and assessment of lands for the Chesapeake and Ohio canal.

And your complainant further shows that by the then existing laws of Maryland the proceedings for condemnation *was* by a sheriff's jury.

And your complainant is informed and believes, and therefore avers, that on the 27th day of July, 1858, at the instance of the Secretary of the Interior, on behalf of the United States, a justice of the peace issued his venire to the sheriff for a jury to assess the damages which the dam of the Washington aqueduct would cause to said company. On the 20th of August following an inquisition was had, certain land and water rights condemned, and damages assessed in the sum of $150,000 in favor of your complainant, which verdict, on the 10th of March, 1859, on the motion of the United States, was set aside and another inquisition ordered in the manner prescribed by the original warrant in the case. And your complainant is informed and believes, and therefore avers, that no new inquisition was had, and that nothing was done by way of condemnation of said land or water rights, or purchase thereof, or payment of any compensation therefor, until November 20, 1862, but that in the meanwhile Congress had appropriated and the Executive had disbursed $2,905,000 for the purpose of bringing water into said District from said Great Falls. On that day articles of agreement between the United States, as party of the first part, and your complainant, as party of the second part, were made and executed, reciting that the first party desired to use a portion of the water at the Great Falls for the purposes authorized by Congress, and the party of the second part claimed to own certain lands in that locality and certain water rights attached thereto, and that all the efforts heretofore made to adjust said claim had failed, after great costs and loss of time on both sides, and, in the absence of any agreement, proceedings must be commenced *de novo*, and again proving unavailing for the want of adequate legislation on the part of Maryland, Virginia, and the intrinsic difficulties of the case; and whereas the party of the first part is anxious to proceed with this great work with as little delay as possible: Now, therefore, with a view to a prompt, fair, and final settlement of this controversy, it is agreed between the parties as follows:

6 Article first. All the claims of the party of the second part for compensation or damages for the occupation and use *of*

the party of the first part of any land or water rights and privileges claimed by the party of the second part shall be submitted to the arbitration of Jesse L. Williams, of Indiana; Hon. B. R. Curtis, of Massachusetts; Hon. G. Swayne, of Ohio; Linus Childs, of Massachusetts, and George M. Dallas, of Pennsylvania, the award of the majority of whom shall be final and conclusive, except as hereinafter stated. The first exception is that the award should not be valid until the Attorney General should decide that the party of the second part had a valid title to said land.

The second exception was that, if either party should be dissatisfied with such award, the party so disputing, within a period not exceeding thirty days from the date thereof, may proceed by a bill in equity, filed in the circuit court of the District of Columbia, to set aside or change said award; otherwise said award shall be final and conclusive.

This agreement, the essential parts of which your complainant has set out, was signed by the Secretary of the Interior, Caleb B. Smith, on behalf of the United States, and by the president of said company.

The agreement was amended in two particulars: first, that Alonzo C. Paige, of New York, might serve in the place of George M. Dallas; and, second, that the arbitrators might award costs of the submission and arbitration, and this amendment was signed by J. P. Upshur, Acting Secretary of the Interior, and by the president of the company.

And your complainant is informed and believes, and therefore avers, that in pursuance of this submission the parties thereto appeared before said arbitrators with their counsel and witnesses, and, after a laborious hearing of several months, at many thousand dollars' expense, during which by mutual consent the title of your complainant to its land and water rights was submitted to be passed upon by the arbitrators, and according to the terms of the submission four several plans for taking land for building the dam and for using the water were submitted to the arbitrators as possible modes in which the United States might take the land and build the dam for diverting the water, and the arbitrators passed upon each of said plans separately and made awards applicable to each.

After full consideration a majority of the arbitrators decided and awarded that if the United States shall adopt and decide to execute the plan of operations designated in the specifications and shown on the plan as dam B, then said company are legally entitled to the sum of fifty thousand dollars as compensation for use and occupation by the United States of the water rights and privileges claimed by said company and all consequential damages.

Second. That if the United States adopt dam A, then the company is legally entitled to sixty-three thousand seven hundred and sixty-six dollars for compensation as aforesaid. But this assess-
7 ment is based upon the condition that said company, as against the United States, may build a canal across and upon the land of the United States on the Virginia shore of the Potomac, so as to use the water of the pool above the dam A, subject to the

superior right of the United States to use the water for the aqueduct to the extent marked on said plan.

Third. And the same arbitrators do award that if the United States shall adopt dam C the company is entitled to $77,000 as compensation as aforesaid, subject to the right of said company to use the water in the pool above dam C as aforesaid.

Fourth. That if the United States shall adopt plan fourth, then the company are legally entitled to the sum of fifteen thousand six hundred and ninety-two dollars as compensation as aforesaid.

Fifth. And the arbitrators awarded the sum of $12,761.84 as the costs of the arbitration, which was paid and charged to the appropriation for the completion of the Washington aqueduct. For all which, for greater certainty, your complainant begs leave to refer at the hearing of the cause to the proceedings, submission, and award of said arbitrators.

And your complainant further shows that said award was duly returned to and filed with said Secretary, and it was demanded of him by said company to decide and establish as to which of said dams the United States would adopt in completing its dam and water-works, but this the Secretary of the Interior declined to do, and said company demanded of him that he would carry out said award, and this he declined to do, sometimes pretending that the Attorney General had not passed upon the title, and sometimes pretending that the Secretary of the Interior had no right to submit the matter to arbitration, and sometimes pretending that he had no appropriation from which to pay the award for either plan.

And your complainant is informed and believes, and therefore avers, that the United States being a disputing party to said award, did not bring a bill in equity in the supreme court of the District of Columbia or in any other court within thirty days from the date of said award, or at any time, to set aside or modify it, and thus by the terms of the submission said award became conclusive and final.

And your complainant is informed and believes, and therefore avers, that notwithstanding no purchase of the land, water rights, and privileges of your complainant had been made by the United States, and no condemnation had thereof, and no judicial act of taking had been undertaken, and no provision by law or otherwise for the compensation of your complainant in the premises had been made, and no further acts done, save the abortive ones hereinbefore mentioned in pursuance of the act of assent of Maryland, that the United States might purchase said land and water rights, were had or done, and the United States had repudiated and set at naught
an award of an arbitration, agreed to and sanctioned by its
8 highest officers, and had refused to test the validity of its own
doings in one of its own courts, in obedience to its own agreement, so as to enable your complainant to get the value of its land and water rights, occupied or to be occupied for public use, certain officers of the United States entered upon the lands and water rights of your complainant in the name of the United States, took posses-

sion of the same, which they have held and used even to the present day.

And your complainant is informed and believes, and therefore avers, that in the year 1867 said officers of the United States, or some of them, from the moneys appropriated for the building and completion of the Washington aqueduct from the Maryland shore across the channel to Conn's Island, did build a dam and abutted the same upon Conn's Island, the land of your complainant, to stop the water of the Potomac river flowing in said channel, and to turn the same into the aqueduct to supply said District with water, thereby taking from said river and diverting the same down to the city of Washington a large portion of the water of said river, and expended upon said works to utilize said water many millions of dollars, in defiance of the joint resolution of Congress of December 11th, 1841, which provides, among other things, "That no money shall be expended upon any land by any executive officer of the United States, unless the Attorney General has first examined and passed upon the title to the same," which had not been done as to the land and water rights of your complainant, "unless the submission of said title to the board of arbitrators aforesaid, to be passed upon by said board, and their award thereon constituted a legal and valid title therein as against the United States."

And your complainant further shows that said dam so built across the channel from the Maryland shore to Conn's Island was not built according to any one of the plans and specifications set out in the award of said arbitrators, but was built in another and different manner from either of the dams set forth in said award.

And your complainant is informed and believes, and therefore avers, that after having exhausted every possible mode of redress which it was advised was open to it to get its rights in the premises and reasonable compensation for the damages done to said lands and said water rights, and finding said dam so constructed was not of any very greater damage to your complainant than dam described as "plan No. 4," felt constrained and obliged, in order to have a tribunal open to it wherein it could prosecute its claim against the United States, to waive the great wrong done to it and its rights, and bring a suit as for a legal taking of its property for public use by the United States, and an implied promise for reasonable compensation therefor in the Court of Claims, and in its petition, set up—

I. Title to the land herein described.

II. Title to the water rights attached and appurtenant to said land.

9 III. The threat of the United States to build a dam and divert the water of said river.

IV. The proceedings instituted by the United States for the condemnation of said lands and water rights by a jury.

V. The submission and proceedings by arbitration, and the award of said arbitrators and failure to bring suit thereon, as they were privileged to do by the terms of said submission.

VI. The fact found by the arbitrators that the title to the land and right to the water appertaining thereto was in your complainant.

VII. The fact that the United States had built said dam in part upon the land of your complainant and had diverted the water.

VIII. The form of construction and height of said dam and the amount of water which flowed in the channel between the Maryland shore and Conn's Island in the natural state of the river.

IX. The amount of compensation and damages done to your complainant by the United States, as above shown.

All these issues of fact and law were each fully, clearly, and specifically set out in the petition to said Court of Claims, and were each and all specifically found by said Court in favor of your complainant in the several findings of fact in said cause, and a conclusion of law was reached by said Court that because of the taking of said land and water rights by the United States from your complainant it was entitled to damages, which were assessed by said Court at the sum of $15,692, from which said findings and judgment the United States appealed to the Supreme Court of the United States, and said appeal was duly heard and considered by said Supreme Court and said judgment was affirmed. Your complainant avers that because thereof the United States, its officers, agents, servants, and privies, are estopped to deny, plead, or aver to the contrary of the facts so found and adjudged by said Courts. And for greater certainty as to said findings and judgment your complainant prays leave to refer in the hearing of this cause to the records of the doings and proceedings of said Courts as if the same were herein fully set out.

And your complainant avers that its constituents and stockholders were first incorporated by the Legislature of Virginia on the 4th day of February, 1839; that owing to certain defects in that act of incorporation a new and more complete act, under which the present organization of the company was effected, was passed on the 1st day of May, 1852.

The object and purpose of said company was for carrying on many branches of manufacture and improving the water power at the Great Falls of the Potomac river. And said company was also permitted, by an act of the Legislature of Maryland passed on the 9th day of March, 1848, to hold land, not exceeding 2,000 acres, in the State of Maryland, said act reciting that: "Whereas the citizens of the county of Montgomery, in the State of Maryland, in common with the citizens of the county of Fairfax, in the State of Virginia, feel a deep interest in the success and prosperity of the Great Falls Manufacturing Company:

That the amount of stock required by its charter was promptly subscribed and the company organized and commenced business on the 19th day of November, 1853. At the time of the incorporation of the company, and at the time of its organization, there had been no attempt to take water from the Great Falls for the District of Columbia. The company named its location at the Great Falls "South Lowell," and laid out a town there. There was no necessity of a canal to be built to use the water, as the unused canal of the old Potomac Navigation Company was at hand to

be utilized at small expense. And there being a fall of seventy-five feet in the bed of the river, within half a mile, there was no occasion to raise a head of water by a dam.

But during the year 1853 surveys were being made by the United States looking to a supply of water to said District, but no decision looking to taking the water from Great Falls was reached of which any authoritative notice was given to the company until an application was made under an act of Maryland to allow the United States to take such land and water as it chose, passed in 1853, and which hung over the enterprise so that the company could not adopt any plan or sell any land or water power at the Great Falls, as the United States might have the same condemned at any moment. And how much the United States might condemn was wholly uncertain until the warrant of the proper officer of Montgomery county, Maryland, was served upon the company, stating "that the head or principal dam of the Washington aqueduct is intended to be constructed across the bed of the Potomac river, and also across an island in said river at or about the Great Falls of said river named Conn's or Bishop's Island." This warrant thus claimed the building of a dam across the river, the height of which was not stated, nor did it state the quantity of water that "would be required as of an absolute estate in perpetuity by the United States of America for the construction of said dam and the use of said aqueduct." From that hour all the operations of the company were paralyzed, because all the world was notified that the United States intended to take a portion of complainant's land and all its water power.

Afterwards, the taking through a jury being abortive, on the 20th of November, 1862, an agreement of submission was filed, as hereinbefore stated, and an award made thereon by the arbitrators awarding to the company $63,766 for the water taken and for the land necessary for a dam across the river, which would not take so much water as the present dam in process of construction, with means, through a bulk-head, on the Virginia shore, for use by the company of all the water not needed by the United States, which amount of water is shown by adjudication of the arbitrators and the Court of Claims to be two per cent. of the water of the river.

And your complainant avers that the great advantage to your complainant of said award if the United States had been bound thereby would have been in the fact of its determination
11 that your complainant could use ninety-eight per cent. of the water of the river in its legitimate manufacturing and commercial enterprise without the interference of the United States, and far beyond any money value of the land and water taken. But although said award did bind the United States, as now adjudicated by the Court of Claims, yet it was set aside by the United States, by pretexts and acts disgraceful to individuals who should make use of such in their own behalf. And the claim the United States makes to all the water of the Potomac river at the Great Falls has been and still remains, with the threat to take the land without providing

payment therefor, an unmeasurable and unendurable cloud upon the title of your complainant, rendering it, during all these years, and all future years, unless removed, valueless to your complainant, as well as to the States of Virginia and Maryland, who, aiding complainant's enterprise, hoped to see "South Lowell" on the Potomac, as the enterprise was first named, more than rival in wealth and power its namesake in Massachusetts, now a city of more than 75,000 inhabitants, engaged in manufacturing, and drawing all its wealth from that business, carried on by machinery driven by water power of but little more than one-third in extent to that which its namesake, "South Lowell," had for the foundation of its business, and which hope would have been realized had the officers of the United States been required by law, administered through the courts of the United States, to exercise towards the said enterprise the same honesty and justice binding on all other persons.

But now so it is, may it please your honors, that in the year 1882 it became necessary, in the judgment of Congress, that a greater and further supply of water should be furnished to the District of Columbia, and section first of an act passed in said year, being chapter 294, entitled "An act to increase the water supply of the city of Washington and for other purposes," provided, among other things, "That the Secretary of War shall make a survey and map of the land necessary for a dam across the Potomac river at the Great Falls, including the land now occupied by the dam and the land required for the extension of said dam across Conn's Island to and upon the Virginia shore; and when surveys and maps shall have been made the Secretary of War and the Attorney General of the United States shall proceed to acquire to and for the United States the outstanding title, if any, to said land and water rights, and when a map and survey are completed the Attorney General shall proceed to ascertain the owners of the lands embraced in the survey, and shall cause to be published for a space of thirty days in some one or more of the daily newspapers published in the District of Columbia a description of the entire tract of land embraced in the survey, with a notice that the same had been taken for the uses mentioned in this act, and notifying all claimants to any portion of said premises to file within its period of publication in the Department of Justice a description of the tract or parcel of land claimed and a statement of its value as estimated by the claim-
12 ant. On application of the Attorney General, the Chief Justice of the Supreme Court of the District of Columbia shall appoint three persons, not in the employ of the Government or related to the claimants, to act as appraisers, whose duty it shall be, upon receiving from the Attorney General a description of any tract or parcel, the ownership of which is claimed separately, to fairly and justly value the same and report such valuation to the Attorney General, who thereupon shall, upon being satisfied as to the title to the same, cause to be offered to the owner or owners the amount fixed by the appraisers as the value thereof, and if the offer be accepted then, upon the execution of a deed to the United States in form satisfactory to the Attorney General, the Secretary of War

shall pay the amount to such owner or owners from the appropriations made therefor in this act. And it is further provided that any corporation having any estate or interest in any of the lands embraced in said survey and map who shall for any reason not have been tendered payment therefor, as above provided, or who shall decline to accept the amount tendered therefor, and any person who by reason of the taking of said land, or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may at any time within one year from the publication of notice from the Attorney General, as above provided, file a petition in the Court of Claims of the United States setting forth his right, title, and the amount claimed by him as damages for the property taken or injuries sustained." * * * "Judgments in favor of such claimants shall be paid as other judgments of said Court are now directed to be paid." * * *

"All claims for value or damages shall, * * * unless a petition for the recovery thereof be filed within one year from the date of the first publication of notice by the Attorney General, as above directed, be forever barred." * * *

"Upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map and proceed with the constructions herein authorized, and upon payment being made therefor, or without payment, upon the expiration of the times above limited, without the filing of a petition, an absolute title to the premises shall vest in the United States." * * *

Again, that the Secretary of War "complete the dam at Great Falls to the level of 148 feet above tide and extend the same at that level across Conn's Island to the Virginia shore."

* * * * * * *

"The following sums of money are hereby appropriated to pay for water rights and land necessary to extend dam at Great Falls to the Virginia shore, $45,000;

"For work and material to complete the dam at Great Falls to the level of 148 feet above tide and extend the same to the Virginia shore, $145,151." (Act of July 15, 1882.)

13 And your complainant is informed and believes, and therefore avers, that, in accordance with the provisions of said act, the Secretary of War did not cause to be made a survey and map of the "land necessary for a dam across the Potomac river at the Great Falls, including the land now occupied by the dam and the land required for the extension of said dam across Conn's Island to the Virginia shore, sufficient with any degree of accuracy, as such survey should have been made, to be the foundation of passing the title to the land and water rights of your complainant necessary to be taken for the purposes of said act.

And your complainant is informed and believes, and therefore avers, that when imperfect maps without survey had been traced, which were the only maps made of said lands shown to your complainant, the Secretary of War and the Attorney General of the United States did not proceed to "acquire to and for the United

States the outstanding title to said land and water rights of your complainant, which said rights and title both the Secretary of War and the Attorney General knew existed from information furnished them by your complainant; and your complainant offered to sell said land and water rights to the United States, at a fair valuation by appraisers, to be appointed mutually between the parties, which said offer was communicated to the Attorney General of the United States by the President of the Great Falls Manufacturing Company soon after the passage of said act.

And your complainant is informed and believes, and therefore avers, that upon said offer not being accepted by the Attorney General and the Secretary of War, on the fifteenth of January, 1883, said company offered to convey to the United States all rights mentioned and awarded in the second paragraph or award, hereinbefore set out, as to dam A, wherein sixty-three thousand seven hundred and sixty-six dollars were awarded to your complainant for compensation for the taking, according to that plan, provided your complainant might lawfully build and maintain a canal and bulkhead across and upon the land of the United States on the Virginia shore of the Potomac, so as to use the water in the pool above the dam "A," subject to the superior right of the United States to use the water in the aqueduct in the manner and to the extent shown by the specifications of said dam A and its corresponding operations, for forty-five thousand dollars, appropriated by Congress to purchase said water rights and land, provided the United States would build said bulk-head mentioned in said award and specification, and connect the same with the old canal, so that your complainant could use the water of said river not needed by the United States for the purposes of said act.

And your complainant is informed and believes, and therefore avers, that the difference between the $45,000, the consideration money for deeding said rights and land to the United States, and the sum of sixty-three thousand seven hundred and sixty-six dollars, awarded by the arbitrators for the use by the United States of said land and water rights required for said dam A, would have been more than sufficient to have made the changes proposed by your
14 complainant in the dam which the United States are now building. But your complainant is informed and believes, and therefore avers, that the Attorney General and Secretary of War never made any answer to the proposition of your complainant, except to inform your complainant that said company had no water rights whatever. And your complainant is informed and believes, and therefore avers. that there was no need, nor was it the intention of said act, to take said land and water rights of your complainant by condemnation, as your complainant was ready and anxious to allow the United States to acquire such land and water rights as the United States desired to buy, at any rate or price to be fixed by any tribunal whatsoever, the parties not agreeing concerning the same, if the United States would permit your complainant to use the remaining water of the river not taken or necessary to be taken by the United States for the purposes of said act, because said action of the

United States would have left the remaining water belonging to your complainant free to be sold in the market to whomsoever might desire to buy it, together with the land of your complainant, to be used with the water, both would have sold at a great price if your complainant's property could have thus been relieved from the oppressive, unjust, and burdensome interference at the hands of the officers of the United States, which had been upon the property of your complainant, overshadowing it like a nightmare, blinding everybody to its value during more than a generation of men.

And your complainant is informed and believes, and therefore avers, that the proposed acquiring of water rights and land for the purposes of a dam, as the same is described in the published notice of the Attorney General on the 20th of August, 1883, is not other and different but substantially the same as the dam "A," the plan of which was submitted to arbitration, and by said arbitration compensation was awarded to your complainant for the land and water rights taken and to be taken for the purpose in the sum of $63,766.00, together with the right of the complainant to use the remainder of the water not taken under said plan by means of proper canal and bulk-head appliances on the Virginia shore of the river.

And your complainant is informed and believes, and therefore avers, that the Secretary of War and the Attorney General of the United States, claiming to act under and according to the provisions of said act to increase the supply of water to the city of Washington and for other purposes, did not proceed to act in accordance therewith or do the things requisite to enable said lands to be taken by the United States under the exercise of the right of eminent domain by the omission to do certain acts required to be done before said taking, and omitting to do the acts necessary for the legal taking of said lands and protecting the rights of your complainant and securing to it reasonable compensation for the property taken, as required by the Constitution of the United States.

I. They did not "proceed to acquire to and for the United
15 States the outstanding title to said lands and water rights" of your complainant.

II. They resorted to condemnation of said lands and water rights when it was unnecessary so to do, and without notifying or calling on your complainant to consent to the acquiring said lands and water rights to and for the United States.

III. The Attorney General did not proceed before condemnation was attempted to ascertain the owners or claimants of said lands of your complainant.

IV. No survey or description of the water rights attempted to be condemned was made, or published or inserted in any newspaper, as a proceeding precedent to said condemnation, nor was any determination arrived at by said Attorney General or by any other person as to the amount of said water rights or water in said river which was to be condemned, nor did he give notice as to how much water was to be so taken by condemnation—whether a part or the whole of said river, so that the appraisers of the value thereof, provided for by said act, could not appraise the water to be taken. On

the contrary, the only claim made by said Attorney General as to said land and water rights, or notified to your complainant, by publication or otherwise, was contained in a newspaper publication in the words and figures following:

"In addition to acquiring to and for the U. S. (*sic*) any outstanding title to these lands at the Great Falls, it is also proposed to acquire all water rights implied in the possession of the same or needed for purposes contemplated by the act under which these proceedings are taken."

"The map of the surveys (in three tracings) required for the uses enumerated in the above-named act of 1882, ch. 294, may be seen at this Department by all claimants to any portion of said premises."

And your complainant says there is no intimation in said publication that said Attorney General and said Secretary of War were resorting to condemnation of said water rights or the land of your complainant at the Great Falls, because, your complainant says, by the very terms of said publication it was notified not that its lands and water rights were to be condemned, but that, "In addition to acquiring to and for the U. S. (*sic*) any outstanding title to the lands at the Great Falls, it is also proposed to acquire all water rights implied in the possession of the same or needed for purposes contemplated by the act under which these proceedings are taken."

VII. And your complainant was misled by said notice as to whether it was intended to condemn its said land and water rights, whereas the notice required by said act, when it became necessary to resort to condemnation of lands and water rights, must "Give a description of the tract or tracts of land embraced in the survey, with notice that the same has been taken for the uses mentioned in this act," thus notifying all claimants to any portion of said
16 premises to file within its period of publication in the Department of Justice a description of the tract or parcel claimed and a statement of its value as estimated by the claimant.

And your complainant avers that it was impossible to comply with such notice as was given, or give any description of water or water rights taken, which those taking had never described, even by specifying the quantity of water they desired to take during a given time, which is the usual and customary mode when water is to be diverted from a stream or river for a public use—that is to say, so many gallons or cubic feet by the minute, the hour, or the day.

And your complainant says that it was quite as impossible for it to comply with the statute under such a notice "by filing a statement of the value, estimated by the claimant," of an unknown quantity of water, which the Attorney General proposed to acquire.

And your complainant avers that it was also left uninformed as to the intention of the Attorney General in publishing said notice as a notice of condemnation of said land, because that your complainant saw in and by said notice that the Attorney General proposed to take and acquire title to the spring lot belonging to the United States, containing about four-tenths acres, and also that it was proposed to hold and acquire title to the lot on which the gate-house at the Great Falls now stands, containing about one-fifth of an acre;

and as your complainant fully believes that said gate-house lot was the property of the United States in fee, as the United States, to the complainant's certain knowledge, had occupied it for more than twenty-five years as its own, your complainant could not believe that the Attorney General of the United States could publish in a newspaper in the District of Columbia that he had taken by condemnation land of the United States from the United states, proposing to acquire title thereto for the United States.

And your complainant is informed and believes, and therefore avers, that the Attorney General, although he applied to the Chief Justice for the appointment of three persons to act as appraisers, as provided in said act, did not give them any description of ar y tract of land, the ownership of which is claimed severally, belonging to your complainant, that said appraisers might fairly and justly value the same, or any water rights, or intimation of water to be taken, nor did said appraisers value either land or water rights belonging to your complainant, nor has any amount been offered to your complainant therefor.

And your complainant is informed and believes, and therefore avers, that no proper, legal steps, as required by statute, were duly taken by said Attorney General and Secretary of War, or either of them, or have been by their successors, or either of them, in said offices, which are requisite and necessary for the condemnation of said lands, or taking the same in due manner and form for public use, or for making compensation or causing compensation to be made therefor to your complainant.

17 And your complainant is also informed and believes, and therefore avers, that your complainant waited after several applications, both verbally and in writing, by its chief executive officer, made to said Attorney General and Secretary of War, till the last day before the expiration of the year limited by said act in which claims might be filed for damages under said act in the Court of Claims, hoping and expecting some steps might be taken by which the land and water rights belonging to your complainant might be legally taken by the United States in such form that your complainant might obtain reasonable compensation for its property taken; and nothing being done, from great caution and fear lest the complainant might lose all benefit of any provision of said act by limitation, it then filed a petition setting forth its claim in order to save the rights of your complainant, and for no other purpose whatever; and your complainant protests that it believes that no sufficient steps have been taken in this regard to give said Court of Claims jurisdiction in the premises, because your complainant says all said acts of said Attorney General and Secretary of War and other servants of themselves and the United States in and about said lands and in the premises were not justified by act of Congress, and therefore are simple trespasses and wrongs done to your complainant, because of which, and the injuries inflicted thereby, said Court of Claims has no jurisdiction whatever.

And your complainant is informed and believes, and therefore avers, that although no notice of any taking has been given in the

manner prescribed by law, and although no act has been done which would justify him in so doing, the Secretary of War in the year 1883, by his servants and agents, wrongfully took possession of the lands of your complainant, claiming to have done so in behalf of the United States, in the State of Maryland and in Virginia, which land was not within any description made, surveyed, or traced by the Secretary of War, and has used said land for the purpose of constructing a dam along a portion of said land across Conn's Island and over said river to the Virginia shore, and has built a large portion of said dam by means of his said servants and agents without making any bulk-head in said dam or any provision whatever by which your complainant can use any portion of the water for manufacturing or other valuable purposes, as was awarded by the arbitrators in their award as aforesaid in favor of your complainants, the dam to be constructed after the manner of plan A.

And your complainant is informed and believes, and therefore avers, that the War Department of the United States has occupied said land with a force sufficient to prevent any opposition of your complainant to its acts and doing or the acts and doings of its servants, agents, and employees without a breach of the peace of the State of Maryland.

And your complainant is informed and believes, and therefore avers, that there had been established at Washington a bench-mark upon or near the foundation of the Capitol at or about the
18 time of its construction, showing the height of the mean tide at Washington, and that from said bench-mark, for a great many years, all levels of public works having any reference to the tide have been measured, and whenever, heretofore, a height has been prescribed by law or regulation in carrying on public works, that the same should be so many feet above or below tide water or tide or mean tide, such works have always been made or constructed with reference to said bench-mark as showing the mean tide, and that heretofore in the measurement and engineering had and done in relation to the height of the dam and other portions of said water-works all measurements have had reference to the mean tide shown by said bench-mark, which has been thus fixed as a standard of the tide.

And your complainant supposed and believed, and still supposes and believes, and therefore avers, that when Congress, in said act, appropriated money in the words following: "For work and material to complete the dam at Great Falls to the level of 148 feet above tide and extend the same to the Virginia shore, one hundred and forty-five thousand one hundred and fifty-one dollars," that the words "to the level of 148 feet above tide" had reference, were equivalent to, and not different from, an enactment that the dam was to be at a level of 148 feet above said mean tide shown by the bench-mark aforesaid and no higher; but your complainant is informed and believes that the servants and agents of the United States and of these defendants, who are building said dam, mean and intend to build, and are building, the same to a greater height than one hundred and forty-eight feet above said mean tide, claiming that the word "tide"

in said act may be construed to require said 148 feet to be so much above the highest tide at said Washington.

And your complainant is informed and believes, and therefore avers, that the building of the dam to the height at which it is now being built, even if it were only 148 feet above mean tide, would flow back water over and upon the lands of your complainant above set forth, to the damage of your complainant, but, if built any higher, will entirely cover with water large portions of your complainant's lands, without any sanction of law or right whatever so to do.

And your complainant is informed and believes, and therefore avers, that even if the provisions of said act were ever so strictly followed by said Attorney General and said Secretary of War and the servants and agents, and their acts done in the premises in strict accordance therewith, yet their said acts and doings, as regards your complainant, would not be justified in law, because said act is unconstitutional and void in its provisions in these:

I. Said act makes no provisions by which reasonable compensation for the property taken for public use under its provisions can be constitutionally and lawfully adjusted and determined.

II. It does not provide that the compensation in its amount shall be ascertained by a verdict of a jury, which is a constitutional right of your complainant.

19 III. The act has provided that whatever wrong and injury may be done to your complainant in carrying on this public work, or in taking its land and water for such purpose of public use, that the only tribunal to which your complainant is compelled to have recourse for the adjudication of its rights is the Court of Claims, which is a court unknown to the Constitution, being neither a court of equity, such as was known to our ancestors at the time of the ratification of the Constitution, nor a court of common law, as said Court does not proceed, by its constitution, in the determination of cases according to the rules of the common law as known and practiced at the time aforesaid.

IV. That said Court of Claims is not other and different from a board of referees constituted by one party to hear and determine such cases as another party will consent to submit to judgment thereby, and even such judgment is not authoritative or binding against the party that chooses the board of referees. In addition to this said act makes a limitation on the power of the referees to enforce any judgment against the United States, because it enacts that judgments of these referees to whom the act compels those whose property is taken for public use alone to resort shall be paid as other judgments of said board of referees are to be paid, only when the judgment debtor pleases to pay them—*i. e.*, pleases to make an appropriation for that purpose.

V. In this, that the act directs property to be taken and entered upon, and the owner dispossessed therefrom, without any provision by which the compensation for taking said property can be paid, and this is done when neither the act nor the surrounding facts show any need of haste in so doing or any necessity which requires that

property be taken until after an appropriation at least has been made for compensation for so doing.

And your complainant is informed and believes, and therefore avers, that it is the purpose and intention of the defendants and those acting with and for them to proceed with said work on said dam, and to take all the water of said river and a portion, not yet defined, of the land of your complainant, without any further payment or provision or action to enable your complainant to get its just rights other and different from that which was done and made by the former aforesaid Attorney General and Secretary of War, their agents and servants.

All which acts, doings, and omissions to do by said defendants and their several agents and servants are for the manifest injury, detriment, and wrong to your complainant, and cannot be remedied by the rules of the common law, but are cognizable in equity; now therefore——

May it please your honors:

I. To grant to the Great Falls Manufacturing Company, your complainant, a writ of summons, issuing from this honorable court under the seal thereof, directed to said defendants, the said Augustus H. Garland, Attorney General of the United States William C. Endicott, Secretary of War of the United States; Garrett J. Lydecker, George B. Chittenden, and Samuel H. Chittenden, and to each of them, under a penalty therein set forth, to make answer to the complaint of your complainant and to each allegation of wrong done your complainant, therein set forth as fully, particularly, and distinctly as if thereunto specifically interrogated, and to stand to, abide by, and perform each and every order, judgment, and decree of this court until duly and lawfully by the order of this court dismissed therefrom.

II. And, further, may it please your honors, to issue a writ of injunction issuing from this court enjoining and restraining said defendants, and each of them, from further occupying said premises and said land of your complainant, or dispossessing and ejecting your complainant therefrom and from making or building any structure on said land of your complainant, or in any way hindering or interfering with the natural flow of the water between Conn's Island and the Virginia shore of said river, so that said water may continue to run as it has been accustomed to run.

III. That this honorable court, by a definite order and decree in the premises, will direct and command said defendants, and each of them, to remove and cause to be removed each and every building, structure, dam, and embankment heretofore erected by said defendants, or either of them, or by any other officer of the United States acting in their behalf in the premises on July 15, 1882, the date of said act.

IV. And your complainant further prays that if it shall appear that any land has been taken lawfully by said defendants, or either

of them, and, together with the water rights condemned to and for public use on behalf of the United States, by reason of acts done or promoted by said defendants, or either of them, that your honors will frame issues in the decision whereof, by a jury, there can be constitutionally and legally determined the extent of land so taken and condemned and the quantity of water, the property of your complainant, that have been or shall be taken by the United States for the District of Columbia, and in how much your complainant has been damnified and how much and what ought to be paid to it for its property so taken to a public use, and that your honorable court will give your complainant judgment for the sum so found by said jury.

V. And that the court, by a definitive order and decree, will restrain and prohibit all persons claiming to act for or on behalf of the United States from occupying or in any way interfering with said lands and water rights until the amount of said judgment shall have been paid to your complainant, or tendered to it, or paid into the registry of this honorable court for your complainant's use.

VI. And your complainant further prays that this honorable court by a definitive order and decree shall remove and dispel the cloud made by the defendant's claiming to act in behalf of the United States upon the title of your complainant to the aforesaid lands and water rights wherein the exact amount of water lawfully
21 taken by the United States from your complainants shall be defined, settled, and adjudged, and the height to which a dam may be made shall be fixed and determined and wherein the proper form, capacity, strength, and manner of construction of a bulk-head or other proper flumes or head races shall be made and kept in repair by said United States, whereby the surplus of overflow of water, subject to the superior right of the United States, may be taken and drawn from the pool made by the United States for the use of your complainant, so that it may draw and use said surplus water in severalty, with proper rights of way to said bulk-head along and over the lands of said United States on the Virginia side of said river.

And for such other and further relief in the premises as to equity and justice shall seem meet.

[Seal Great Falls Manufacturing Co., Potomac, Fairfax Co., Va.]

GREAT FALLS MANUFACTURING COMPANY,
By BENJ. F. BUTLER, *Its President.*

DISTRICT OF COLUMBIA, *ss:*

I, Benjamin F. Butler, make oath that I have read the bill of complaint by me above subscribed and know the contents thereof, and that the matters and things therein set forth and averred on knowledge are true, and those set forth on information and belief I believe to be true.

BENJ. F. BUTLER.

Subscribed and sworn to before me this 16th day of April, 1885.

[Seal Jno. W. Parsons, Notary Public, District of Columbia.]

JNO. W. PARSONS,
Notary Public, D. C.

GEORGE M. ROBESON,
BENJ. F. BUTLER,
O. D. BARRETT,
Of Counsel.

22 *Order for Hearing.*

In the United States Circuit Court for the District of Maryland.
Equity.

THE GREAT FALLS MANUFACTURING COMPANY, Complainant.

against

AUGUSTUS H. GARLAND, U. S. Attorney General; WILLIAM C. ENDICOTT, U. S. Secretary of War; Garrett J. Lydecker, George B. Chittenden, and Samuel H. Chittenden, Defendants.

This cause came on for hearing at the present term on complainant's motion for an injunction, and the same having been agued by counsel for complainant and considered by the court, it is this sixth day of May, eighteen hundred and eighty-five, ordered that the defendants, Augustus H. Garland, William C. Endicott, Garrett J. Lydecker, George B. Chittenden, Samuel H. Chittenden, and each of them, show cause in this court on the twenty-seventh day of May, eighteen hundred and eighty-five, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, why an injunction shall not be issued restraining them, and each of them, in accordance with the prayers of complainant's bill, provided that said defendants be served,
23 on or before the eleventh day of May, eighteen hundred and eighty-five, each with a certified copy of this order and a certified copy of the bill of complaint filed in this cause.

By the court:

HUGH L. BOND,
Cr. Judge.

Subpœna.

THE UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

To Augustus H. Garland, Attorney General of the United States; William C. Endicott, Secretary of War of the United States; Garrett J. Lydecker, George B. Chittenden, and Samuel H. Chittenden, Greeting:

You are hereby commanded that, all excuses and delays set aside, you be and appear at the clerk's office of the circuit court of the United States for the fourth circuit in and for the district of Maryland on the first Monday in June next to answer unto the bill of

complaint of The Great Falls Manufacturing Company in
24 said court exhibited against you. Hereof you are not to fail at your peril; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of our Supreme Court, the 5th day of May, in the year of our Lord 1885. Issued 5 day of May, 1885.

[L. S.] JAS. W. CHEW, *Clerk.*

MEMORANDUM.—The defendants are required to enter their appearance in the suit, in the clerk's office, on or before the first Monday of June next; otherwise the bill may be taken *pro confesso.*

(MEMORANDUM.—Five certified copies of the bill and order were sent with the subpœna, to be left with the defendants.)

Marshal's Return.

"Summoned George B. Chittenden, and copy of bill and order left May 8th, at 11 a. m., 1885. Other defendants *non est.* J. M. McClintock, U. S. Marshal."

25 *Affidavit of Service. Filed 7th May,* 1885.

In the United States Circuit Court of the District of Maryland.

THE GREAT FALLS MANUFACTURING COMPANY, Complainant,

against

AUGUSTUS H. GARLAND, U. S. Attorney General; WILLIAM C. ENDICOTT, U. S. Secretary of War; Garrett J. Lydecker, George B. Chittenden, and Samuel H. Chittenden, Defendants.

DISTRICT OF COLUMBIA, *ss:*

I, O. D. Barrett, make oath that I have this day served a certified copy of the bill of complaint filed in the above-entitled cause, and a certified copy of the order passed therein, on the sixth day of May, eighteen hundred and eighty-five, as provided by the terms of said order, on the defendants, Augustus H. Garland, U. S. Attorney General; William C. Endicott, U. S. Secretary of War, and Samuel H. Chittenden; that said service was made on said defendants in the city of Washington, D. C., on this seventh day of May,
26 eighteen hundred and eighty-five.

O. D. BARRETT.

Subscribed and sworn to before me this seventh day of May, eighteen hundred and eighty-five.

[L. S.] JNO. W. PARSONS,
Notary Public, D. C.

Affidavit of Service. Filed 12th May, 1885.

In the United States Circuit Court for the District of Maryland.

THE GREAT FALLS MANUFACTURING COMPANY, Complainant,
against
AUGUSTUS H. GARLAND, U. S. Attorney General; WILLIAM C. ENDICOTT, U. S. Secretary of War; Garrett J. Lydecker, George B. Chittenden, and Samuel H. Chittenden, Defendants.

DISTRICT OF COLUMBIA, *ss:*

27 I, O. D. Barrett, make oath that I have this day served a certified copy of the bill of complaint filed in the above-entitled cause, and a certified copy of the order passed therein, on the sixth day of May, eighteen hundred and eighty-five, as provided by the terms of said order, on the defendant, Garrett J. Lydecker; that said service was made on said defendants in the city of Washington, D. C., on this eleventh day of May, eighteen hundred and eighty-five.

O. D. BARRETT.

Subscribed and sworn to before me this eleventh day of May, eighteen hundred and eighty-five.

[L. S.] JNO. W. PARSONS,
Notary Public, D. C.

On the 28th May, 1885, the Honorable John Goode, Solicitor General of the United States, appears for all the defendants who have been served with copy of the bill and order for the purpose of resisting the motion for injunction.

28 *Affidavit of Garrett J. Lydecker. Filed 28th May,* 1885.

In the Circuit Court of the United States for the District of Maryland.

THE GREAT FALLS MANUFACTURING COMPANY
vs.
AUGUSTUS H. GARLAND *et al.*

Before me, a notary public in and for the city of Washington, District of Columbia, personally appeared Garrett J. Lydecker, who, being duly sworn, says that he, with George B. Chittenden and Samuel H. Chittenden, defendants, were served with copies of plaintiff's bill and of the rule of court to show cause why the injunction prayed for should not issue, and since receiving said copies he has not been able to make full and detailed answer to all the allegations contained in said bill, but in response to so much thereof as he is advised is material and relevant to the questions involved in this motion this affiant says as follows:

He did, in pursuance of an act of Congress providing for the increase of the water supply of the city of Washington and for other

purposes, approved July 15th, 1882, after being duly assigned to the charge of the work contemplated by said act, and under the directions of the Secretary of War, cause to be made a survey and map of the land necessary for a dam across the Potomac river at the Great Falls, including the land now occupied by the dam and the land required for the extension of the said dam across Conn's Island to and upon the Virginia shore, and that such survey was made with all accuracy required as a foundation for passing title to any land or water rights taken for the purposes of the act aforesaid, and the map of the survey aforesaid was forwarded to the Secretary of War and by him transmitted to the Attorney General of the United States for such further action as was called for by the act of Congress hereinbefore mentioned, in pursuance of which substantial notice was given, by publication in one or more of the daily newspapers published in the District of Columbia, that the lands indicated on the maps and water rights appurtenant thereto had been taken for the contemplated purposes.

Your affiant also says that in further execution of the duties imposed upon him he did, as the representative of the United States, on the 7th day of November, 1883, enter into contract with the defendants, George B. Chittenden and Samuel H. Chittenden, under the firm name of Chittenden Bros., for the completion by them of the dam at Great Falls to the level of 148 feet above tide and its extension at that level across Conn's Island to the Virginia shore. Under the operations of said contract affiant has already paid to the contractors for work on the extension of the dam the sum of $67,467.78, of which sum not less than $40,000 is for work done in the so-called Virginia channel of the Potomac river, and there is further due to the said contractors a retain fund of $6,750, which cannot be paid until their work is finished. The most difficult part of the work, involving the construction of about 100 feet of the dam covering the deepest portion of the Virginia channel, is now in progress, and to that end the said contractors have expended at least $20,000 in building coffer-dams and other auxiliary structures, all of which must be lost to them if they are prevented from completing their work during the present season, and they have only now placed themselves in readiness for this work after a suspension of all operations during the past winter and early spring months. The said contractors have also a considerable force of men employed on the dam, in the stone quarry, and in the transportation of stone to the site of the dam, all of whom must be suddenly thrown out of employment if the work should be summarily suspended.

Affiant further says that the construction of this dam is a vital part of the project for increasing the water supply of the city of Washington, which includes, in addition, the extension of the Washington aqueduct and the construction of a new reservoir, all of which work is now in progress, and the cost of which has aggregated, to date, the sum of $1,055,225. It is a matter of the highest public interest that this great work should be completed at the earliest date possible.

And affiant further says that it is in no manner proposed to take

all the water of the Potomac river, as averred by complain-
31 ant; that the flow of said river at its lowest reported stage is 1,063 cubic feet per second, or 787,033,057 gallons in 24 hours; whereas the capacity of the Washington aqueduct, running full, is only 85,000,000 gallons in 24 hours, so that only about 10¾ per cent. of the least flow of the river can be drawn off by the said aqueduct; nevertheless, affiant has always understood that the United States, by virtue of its present and heretofore existing proprietary rights on the Virginia and Maryland shores, is entitled to 50 per cent. of the river's flow and dynamic power.

G. J. LYDECKER.

Sworn and subscribed before me this 27th day of May, 1885.

[L. S.] JAS. M. EWING,
Notary Public.

32 48th Congress, 2d Session. SENATE. Ex. Doc. No. 43.

Letter from the Attorney General,

Transmitting, in response to Senate resolution, January 20, 1885, the proceedings under the act of Congress approved July 15, 1882, for increasing the water supply of the city of Washington. Filed 28 May, 1885.

January 22, 1885. Referred to the Committee on the District of Columbia and ordered to be printed.

DEPARTMENT OF JUSTICE, WASHINGTON, *January* 20, 1885.

SIR: I have the honor to make report of the proceedings under the act of Congress approved July 15, 1882, entitled "An act to increase the water supply of the city of Washington, and for other purposes," as follows:

On the 17th August, 1883, I received from the Secretary of War a description of the land deemed by him necessary to extend the Washington aqueduct from its present eastern terminus to the high ground north of Washington, near Sixth street extended, and of the land necessary for a reservoir at that point, and of the land necessary for a dam across the Potomac river at Great Falls, including the land now occupied by the dam and the land required for the extension of said dam across Conn's Island to and upon the Virginia shore, and also of the land on which the gate-house at Great Falls stands, together with maps and surveys. Thereupon, commencing on the 21st August, 1883, I published for thirty days in three daily papers of the District of Columbia the description so transmitted, with a notice that the same had been taken for the purposes mentioned in the act, and notifying all claimants to any portion of said premises to file, within the period of publication, in the Department of Justice, a description of the tract or parcel claimed, and a statement of its value as estimated by the claimant. A copy of this notice is hereto appended. The claims thus filed were transmitted to the Secretary of War to ascertain whether they were suffi-

ciently definite in their descriptions to be capable of location on the ground. As fast as the same were located by the officers of the War Department, upon the original or amended descriptions, I requested Matthew G. Emery, Thomas J. Fisher, and Brainard H. Warner, appraisers, appointed January 15, 1884, upon my application, by the chief justice of the District of Columbia, to fairly and justly value the same, without reference to the value of the lands for the uses for which they were taken, and report such valuation to me.

Upon receipt of the valuations I invited the claimants to sub-
33 mit to me an abstract or chain of title. In the cases where this valuation was acceptable to the claimant and the title was satisfactory to me, I sent to the Secretary of War the several deeds executed by claimants, with the statement that upon payment of the consideration (the amount fixed by the appraisers) the deed of conveyance would assure to the United States a valid title.

The following are the claims thus completed:

Mrs. Mary M. C. Seiler, part of lot 18, block 16, in the Howard University subdivision; consideration, $1,540; deed dated April 30, 1884. Opinion May 1, 1884; subject to an incumbrance.

Mrs. Kate C. Dowling, part of lot 14, block 11, in Howard University subdivision; consideration, $1,088; deed dated May 2, 1884. Opinion May 2, 1884; good title.

Mrs. Margaret Finn Hallig, part of lot 14, block 11, Howard University subdivision; consideration, $2,465; deed dated May 8, 1874. Opinion May 16, 1884; title good, subject to incumbrance.

Ella L. Thomas and Matilda Stanton, part of lot 12, block 16, Howard University subdivision; consideration, $1,175; deed dated May 7, 1884. Opinion May 21, 1884; title good.

Charles M. McKenney, part of lot 18, block 16, Howard University subdivision; consideration, $935; deed dated May 22, 1884. Opinion May 24, 1884; title good.

Charles B. Purvis, part of lot 6, block 23, Howard University subdivision; consideration, $3,062.50; deed dated May 7, 1884. Opinion May 27, 1884; title good.

James B. Johnson, lots 1, 2, 3, 18, 19, and 20, block 24, in Howard University subdivision; consideration, $5,962.50; deed dated May 22, 1884. Opinion May 27, 1884; title good

Benjamin R. Hodges, part of lot 17, block 16, in Howard University subdivision; consideration, $640; deed dated May 31, 1884. Opinion June 2, 1844; title good, subject to incumbrance.

John Walker, part of lot 17, block 16, Howard University subdivision; consideration, $1,785; deed dated May 29, 1884. Opinion June 10, 1884; title good, subject to incumbrance.

Meredith Eatman, lot 10, block 16, Howard University subdivision; consideration, $1,750; deed dated May 29, 1884. Opinion June 11, 1884; title good.

George Grice and Wilson Grice, part of lot 20, block 16, Howard University subdivision; consideration, $1,425; deed dated June 3, 1884. Opinion June 13, 1884; title good.

Diana Walker *et al.*, lot 16, block 16, Howard University subdivision; consideration, $1,150; deed dated June 18, 1884. Opinion June 18, 1884; title good.

Mrs. Anna L. Woodbury, lot 18, block 22, Howard University subdivision; consideration, $1,326: deed dated June 23, 1884. Opinion June 25, 1884; title good.

Mrs. Elmira G. Wheeler, lot H, block 22, Howard University subdivision; consideration $1,300; deed dated June 23, 1884. Opinion June 26, 1884; title good.

John O'Connell, lots C, D, E, and F, block 22, Howard University subdivision; consideration, $3,500; deed dated June 26, 1884. Opinion dated June 28, 1884; title good, subject to incumbrance.

John A. Pierre, lot G, in block 22, Howard University subdivision; consideration, $1,300; deed dated May 31, 1884. Opinion June 28, 1884; title good.

Otis F. Presbrey, lot 7, block 12, Hall and Elvans' subdivision of Meridian Hill; consideration, $1,400; deed dated July 7, 1884. Opinion July 7, 1884; title good, subject to incumbrance.

William Harris, lot 3, block 11, Howard University subdivision; consideration, $450; deed dated June 26, 1884. Opinion July 22, 1884; title good.

Almos P. Bogue, lot L, in block 22, Howard University subdivision; consideration, $1,300; deed dated July 21, 1884. Opinion July 30, 1884; title good.

Charles F. Cost, lot A, block 22, Howard University subdivision; consideration, $1,300; deed dated July 7, 1884. Opinion August 2, 1884; title good.

Evan Lyons, part of a tract of land known as "Pretty Prospect;" consideration, $3,500; deed dated August 2, 1884. Opinion August 6, 1884; title good, subject to incumbrance.

Almos P. Bogue, lot K, block 22, Howard University subdivision; consideration, $1,375; deed dated August 8, 1884. Opinion August 11, 1884; title good.

William Walker, lot I, block 22, Howard University subdivision; consideration, $1,300; deed dated August 7, 1884. Opinion August 12, 1884; title good.

Jacob Karr, lot 11, block 16, Howard University subdivision; consideration, $750; deed dated August 12, 1884. Opinion August 13, 1884; title good.

Adeline Brooks, lot A, block 16, Howard University subdivision; consideration, $900; deed dated July 25, 1884. Opinion August 14, 1884; title good.

34 Henry Wolford and Marks Shilberg, lot B, block 22, Howard University subdivision; consideration, $1,300; deed dated August 15, 1884. Opinion August 15, 1884.

Howard University, lots 13, 14, 15, D, E, F, in block 16; lots 1, 2, 3, 4, 5, 6 (east half), and 7, in block 23; lots 1 to 16, inclusive, in block 9; lots 14 and 15, in block 22, Howard University subdivision; consideration, $18,294.10; deed dated July 7, 1884. Opinion August 18, 1884; title good.

Nancy Richards, lot M, block 22, Howard University subdivision; consideration, $1,300; deed dated July 28, 1884. Opinion August 20, 1884; title good, subject to incumbrances.

John M. Brown, lot 8, block 23, Howard University subdivision; consideration, $8,625; deed dated August 20, 1884. Opinion August 21, 1884; title good, subject to incumbrances.

Francis H. Smith, trustee, lot N, and part of lots L and M, in block 22, Howard University subdivision; consideration, $454; deed dated August 21, 1884. Opinion August 21, 1884; title good.

Albert T. Shurtleff, part of lot 6, block 12, Hall and Elvans' subdivision of Meridian Hill; consideration, $1,194; deed dated August 18, 1884. Opinion August 21, 1884; title good.

The act of July 15, 1882, provided that all claims for value or damages on account of ownership of any interest in said premises, or on account of injury to a property right by the construction of said works, shall, unless a petition for the recovery thereof be filed within one year from the date of the first publication of notice by the Attorney General, as above directed, be forever barred, and that any person or corporation having any estate or interest in any of the lands embraced in said survey and maps who shall, for any reason, not have been tendered payment therefor, as above provided, or who shall have declined to accept the amount tendered therefor, and any person who by reason of the taking of said land, or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right may at any time within one year from the publication of notice by the Attorney General, as above provided, file a petition in the Court of Claims of the United States setting forth his right and title and the amount claimed by him as damages for the property taken or injury sustained, and upon payment being made therefor, or without payment upon the expiration of the times above limited without the filing of a petition, an absolute title to the premises shall vest in the United States.

Five of the claimants, to wit, the Great Falls Manufacturing Company, the Chesapeake and Ohio Canal Company, Evan Lyons, Frederick Wetzel, and the Howard University, availed themselves of this remedy, and as to these no doubt has been felt that the Attorney General became on the 22d August *functus officio*. A greater number who, for some reason or other, had not been tendered payment failed to file their petitions in the Court of Claims, and unless Congress relieves them they are remediless.

The present status of these cases is as follows:

10. William Linkins, filed September 12, 1883. Part of lot 12 and lots 13, 14, 15, 16, and part of lot 17, in block 4, Meridian Hill. Amended claim filed November 2, 1884, for 22 lots in block 4, Meridian Hill, being lots 4 to 25, inclusive. Our tunnel traverses lots 9 and 20 a distance of 278 feet, and lot 17 a distance of 57 feet; appraised at $167.50; received from claimant chain of title August 19, 1884; requested United States attorney to examine title August 20, 1884; received report from United States Attorney Worthington showing title to lots 9 and 20 good, subject to certain incumbrances;

May 1, 1884, received location; March 18, requested appraisement; August 11, appraisement received.

11. George E. Moore, Sr., claim filed September 12, 1883, for 20 acres required for a reservoir. March 1, 1884, received from Secretary of War description by metes and bounds; March 1, 1884, requested appraisement; March 21, 1884, received valuation, $44,733; February 29, 1884, requested claimant to furnish chain of title; received chain of title from claimant; July 30, 1884, requested United States attorney to examine title; August 20, 1884, received report of United States attorney.

35 Thomas Ready, claim filed for lots 18 to 22, inclusive, in the subdivision of Harlem. The tunnel traverses the property claimed by him a distance of 591.8 feet. This has been appraised at $295.90. We have also taken a tract of land supposed to be included in his claim containing 636 thousandths of an acre, appraised at $175. Received definite description of the surface taken May 1, 1884; requested appraisement of same; May, 1884, received appraisement of same; May 1, 1884, received definite location of tunnel; May 19 requested appraisement of same; August 11, 1884, received valuation.

14. Jeremiah Harrington, claim received September 14, 1883, for lot 17 in Jones' subdivision of Harlem. The tunnel appears to traverse the property claimed by him a distance of 473 feet, appraised at $236.50. We have also taken a tract of land supposed to be included in his claim containing 249 thousandths of an acre, appraised at $100. Received definite description of surface; May 2, 1884, requested appraisement; May, 1884, received appraisement; May 1, 1884, received location of tunnel; May 19, 1884, requested appraisement; August 11, 1884, received appraisement.

17. Moses Kenner, claim received September 15, 1883, for improvements on lot D, block 16. The title to this property was in the Howard University, and the United States have paid to it for the land and improvements and taken a deed therefor.

18. John Dugan and Brothers, claim filed September 15, 1883, for lots 1 and 2 in the subdivision of Harlem. I am unable to say whether either of these lots has been taken or traversed by the tunnel, as the Secretary of War, in describing the land taken and traversed at and about the location of this claim, has used metes and bounds, and has not adopted the survey which subdivides Harlem into lots.

19. Simon Butler, claim for rent and improvements on lot 13, block 16, Howard University subdivision. This property belonged to the Howard University, and is included in its deed of July 7, 1884.

22, 42. C. H. E. Richardson, A. P. Fardon, Seymour W. Tullock, John C. Ingersoll, Mamie Ingersoll, Mary Ingersoll, George Taylor, George H. Williams, A. Pollock, received September 17 and 21, 1883, for land taken for working shaft and right of way for tunnel. The tunnel traverses the land included in this claim a distance of 901 feet; appraised at $450.50. We have also taken a tract of land supposed to be included in this claim containing 21,000 square feet,

appraised at $3,150. March 15, 1884, received definite description of surface; March 18, 1884, requested appraisement; April 18, 1884, received appraisement; May 1, 1884, received definite description of tunnel; May 19, 1884, requested appraisement; August 11, 1884, received appraisement.

29. Garfield Memorial Hospital, filed September 18, 1883, for part of a tract of land known as Mount Pleasant. The tunnel appears to traverse the land embraced in this claim a distance of 300½ feet, appraised at $150.25. May 1, 1884, received definite description; May 19, 1884, requested appraisement; August 11, 1884, received appraisement.

30. C. G. Schneider, received September 19, 1883, for land north of Boundary street, between Tenth and Eleventh streets N. W. The tunnel appears to traverse the land embraced in this claim a distance of 154.9 feet, appraised at $77.45. May 1, 1884, received definite description; May 19, 1884, requested appraisement; August 11, 1884, received appraisement.

32. James Ware, claim filed September 19, 1883, for improvements on lots E and F, in block 16, Howard University subdivision. This property belonged to the Howard University, and is included in its deed of July 7, 1884.

33. Leroy Tuttle, filed September 19, 1883, for lots 14 and 15 on Kalorama avenue. Lot No. 15 has been taken off for an air-shaft, appraised at $1,215. The tunnel traverses lot No. 14 a distance of 50.5 feet, appraised at $25.25. May 1, 1884, received definite description of tunnel; May 19, 1884, requested appraisement; August 11, 1884, received appraisement; March 15, 1884, received definite description of surface; March 18, 1884, requested appraisement; April, 1884, received appraisement; May 22, 1884, requested United States attorney to examine title to lot 15; August 21, 1884, received report of United States attorney that record title is defective, and that he is unable to express an opinion as to title by adverse possession.

35. J. S. McKenney and Charles H. Cragin, filed September 19, 1883, for a tract of land called Spring Hill, west of and adjoining Georgetown College. The tunnel appears to traverse the property embraced in this claim a distance of 885.3 feet, appraised at $442.90. We also seem to have taken of this property one acre and 27 and 82 hundredths perches, appraised at $400. March 15, 1884, received definite description of land; March 18, 1884, requested appraisement; April 18, 1884, received appraisement; May 1, 1884, received definite description of tunnel; May 19, 1884, requested appraisement; August 11, 1884, received appraisement; May 29, 1884, requested United States attorney to examine title; August 20, 1884, received report of United States attorney on title.

Otis F. Presbrey, claim filed September 21, 1883, for lots 42 to 51, and 77 to 94, in his subdivision of the Widow's Mite. The tunnel appears to traverse this property as follows: through lots 51,
36 50, 49, 48, 47, 85, 84, 83, 82, 81, 90, 91, 92, 93, 94, a distance of 728 feet, appraised at $361.50. May 1, 1884, description of

tunnel received; May 19, 1884, appraisement requested; August 11, 1884, appraisement received; claimant notified.

40. W. F. Ross, September 21, 1884, and A. P. Fardon, conflicting claims for 6,632 square feet of lot 8, block 12, Hall and Elvans' subdivision of Meridian Hill; appraised land, $1,326.40; improvements, $250. March 15, 1884, description received; March 18, 1884, appraisement requested; May 9, 1884, appraisement received; May 22, 1884, district attorney requested to examine title; July 18, 1884, district attorney reports title in Fardon, subject to equity in Ross.

41. W. W. Stindcomb, claim filed September 21, 1883, for land on the new road. Although his description is indefinite it would seem that the tunnel traverses property claimed by him for a distance of 213.6 feet, appraised at $106.80. May 1, 1884, received description; May 19, 1884, requested appraisement; August 11, 1884, received appraisement; August 13, 1884, claimant requested to furnish chain of title; August 20, 1884, requested the United States attorney to examine title.

43. George Taylor, claim filed September 21, 1883, for lots 18 and 19 of Hall and Elvans' subdivision of Meridian Hill. The tunnel appears to traverse lot No. 18 for a distance of 154 feet, appraised at $77; May 1, 1884, description received; May 19, 1884, appraisement requested; August 11, 1884, appraisement received; August 13, 1884, claimant notified to furnish chain of title.

45. Lawrence Hickey, claim filed September 22, 1883, for lot 19, block 16, Howard University subdivision, appraised January 25, 1883, at $3,125; claimant requested February 29, 1884, and July 26, 1884, to furnish chain of title; September 25, 1884, title furnished by claimant.

46. George Truesdell, claim filed September 25, 1883, for 4.37 acres between Kalorama avenue, Woodley lane, Columbia road, and Garfield avenue. The tunnel appears to traverse the land in this claim for a distance of 479.5 feet, appraised at $239.75; May 1, 1884, description of tunnel received; May 19, 1884, appraisement requested; August 11, 1884, appraisement received; August 18, 1884, claimant requested to furnish chain of title.

47. Claim of Emily E. Weiss. This property does not appear to have been taken.

49. Great Falls Manufacturing Company, claim received October 9, 1884. No appraisement was requested of the property and rights claimed by this company, as questions of law were involved and it was deemed impossible, without the examination of numerous witnesses, to arrive at the value of the land to be taken, exclusive of the uses for which it was to be taken and exclusive of the injury to be wrought by the taking upon other property and rights of the claimant, and an ample remedy was afforded by the statute by resort to the Court of Claims.

51. R. Tompkins, claim received November 1, 1883, for lot 11 in block 12 of the subdivision of Meridian Hill. This property was not taken.

52. Helen Rand Tindall, claim filed January 8, 1884, for lot 18 of L. R. Tuttle's subdivision of Widow's Mite. This land was appraised

at $729 for a thirty-foot strip on the western side, or $1,215 for the whole lot. March 15, 1884, description received; March 18, 1884, appraisement requested; April, 1884, appraisement received; May 22, 1884, requested United States attorney to examine title; August 21, 1884, United States attorney reports (see Tuttle's case).

53. Adolphus G. Wells claims land on both sides of the river at Great Falls. (No appraisement, for same reason as in 49.)

57. Richard Smith, attorney for the heirs of Sally Smith, received May 6, 1884, for a lot in Georgetown and for damages for the tunnel. It appears that the tunnel traverses this property for a distance of 1,697.5 feet, appraised at $848.75, and also that 6,103.96 square feet in Georgetown have been taken, appraised at $610.39. May 1, 1884, received description of tunnel; May 19, 1884, requested appraisement; August 11, 1884, received appraisement, received description of surface, requested appraisement, received appraisement; August 20, 1884, district attorney reports title good in the heirs of John A. Smith, but requires evidence as to who they are.

Josiah Dent, claim received August 19, 1884, for land through which the United States are constructing an extension of the Washington aqueduct. It would appear that the tunnel traverses the land claimed a distance of 1,193 feet, appraised at $596.50. May 1, 1884, description received; May 19, 1884, appraisement requested; August 11, 1884, appraisement received; August 13, 1884, Mr. Dent notified.

Mrs. Harriet C. Stuart, received September 2, 1884, claiming lots 14 and 19 in Tuttle's subdivision of Widow's Mite, and abstract of title. It appears that the tunnel traverses lot 14 a distance of 50.5 feet, appraised at $25.25. May 1, 1884, location received; May 21, 1884, appraisement requested; August 11, 1884, appraisement received; August 13, 1884, Mrs. Stuart notified.

Anna W. Morton, received September 23, 1884, claiming the Morton place and inclosing abstract of title. It would appear that the tunnel traverses the property claimed for a distance of 206.5
37 feet, appraised at $103.50. May 1, 1884, location received; May 19, 1884, appraisement requested; August 11, 1884, appraisement received; August 13, 1884, Morton heirs notified.

Georgetown College, August 15, 1884, claiming land, alleging uninterrupted possession for one hundred years. It would appear that the tunnel traverses the land claimed by the Georgetown College for a distance of 717 feet, appraised at $358.50, and that we have taken a piece of land containing one acre three roods and nine and fifty-two one-hundredths acres, appraised at $400. May 1, 1884, description of tunnel received; May 19, 1884, appraisement requested; August 11, 1884, appraisement and description of surface received; March 18, 1884, appraisement requested; April 18, 1884, appraisement received; August 13, 1884, Georgetown College notified.

Frank M. Green received January 2, 1885, his abstract of title to lots 17, 37, 41, 43, 44, 45, 48, 49, 52, 53, 54, lots 70 to 75 and 96 to 190, in Presbrey's subdivision of Widow's Mite.

It appears that of the lots so claimed the tunnel traverses lot 48 and 49, already claimed by O. F. Presbrey, a distance of 101 feet,

appraised at $50.05, but it does not appear that any others are affected.

In view of the provisions of the statute opening the Court of Claims to any one who for any reason had not been tendered payment, and forever barring those who did not present their claims within one year from the date of publication, and vesting in the United States an absolute title where no petition had been filed, I have not felt authorized to tender payment or to take any steps since the 21st of August, 1884. I am led to believe that many if not all the claimants above recited who failed so to present their claims did so under the misapprehension that the court was open only to those who were dissatisfied with the award, or whose claims were not cognizable by the appraisers. It became evident as the close of the year designated by the statute approached that the work of appraisement, examination of titles, and removal of incumbrances would occupy more than the allotted time, and on the 21st June, 1884, I addressed you a communication, a copy of which is hereto annexed. I respectfully renew the recommendation as to extension of time with the modification that the time be extended to one year from the passage of the act. Most of the titles lay outside of the city limits, and had never received at the hands of purchasers that thorough examination which is exacted by this Department, and consequently little assistance was to be gained from previous labors. As will be noticed, many titles have been reported upon by the United States attorney, but have not been considered, and many have not yet been examined by him.

The work of appraisement has been accomplished, but the last report was made so near the 21st of August as to give the claimants very inadequate opportunity to examine the report and comply with the statute.

I think the work of condemnation, appraisement, and purchase was prosecuted diligently by all concerned, but the number of properties involved and the intricacies of the titles were too great for the accomplishment in one year of all that was required.

Very respectfully,

BENJAMIN HARRIS BREWSTER,
Attorney General.

The President of the Senate.

DEPARTMENT OF JUSTICE,
WASHINGTON, *June* 21, 1884.

SIR: I deem it my duty to call the attention of the Senate to the following matter:

By the act of July 15, 1882, chapter 294, to increase the water supply of the city of Washington, provision is made for publica-
38 tion, among other things, of a description of the lands taken, with notice to claimants thereof, after which there must be an appraisement, an examination of title, and other proceeding as to each tract separately owned, and the claimants under certain speci-

fied circumstances are allowed to sue in the Court of Claims for the value or damages within one year from the first publication of such notice.

The notice by publication required by the act [was] given August 21, 1883, but the subsequent proceedings have taken more time than was anticipated, and it is probable that they cannot be completed as to all the tracts taken before August 21, 1884, in which case the claimant might be barred of any remedy in court.

I respectfully recommend, therefore, that the provision in said act authorizing suit by claimants in the Court of Claims be amended so as to require the petition to be filed within one year and six months from the publication instead of one year, as now provided.

Very respectfully,

BENJAMIN HARRIS BREWSTER,
Attorney General.

The President of the Senate.

Condemnation of Land for Water Supply.

WASHINGTON CITY,
DEPARTMENT OF JUSTICE, *August* 21, 1883.

Whereas, by section 1 of the act of 1882, chapter 294 (July 15), entitled "An act to increase the water supply of the city of Washington, and for other purposes," it is, among other things, provided "that the Secretary of War shall cause to be made a survey and map of the land necessary to extend the Washington aqueduct from its present eastern terminus to the high ground north of Washington, near Sixth street extended, and of the land necessary for a reservoir at that point, the capacity of which shall not be less than three hundred million gallons, and a like survey and map of the land necessary for a dam across the Potomac river at the Great Falls, including the land now occupied by the dam and the land required for the extention of said dam across Conn's Island to and upon the Virginia shore; and when surveys and maps shall have been made the Secretary of War and the Attorney General of the United States shall proceed to acquire to and for the United States the outstanding title, if any, to said land and water rights and to the land on which the gate-house at Great Falls stands by condemnation;" and also that "when the map and survey are completed the Attorney General shall proceed to ascertain the owners or claimants of the premises embraced in the survey and shall cause to be published for the space of thirty days, in one or more of the daily newspapers published in the District of Columbia, a description of the entire tract or tracts of land embraced in the survey, with a notice that the same has been taken for the uses mentioned in this act, and notifying all claimants to any portion of said premises to file, within its period of publication, in the Department of Justice a description of the tract or parcel claimed and a statement of its value, as estimated by the claimant;" all of which will better appear upon reference to such act; and

Whereas such map and survey have been completed:

Now, therefore, in accordance therewith and under the above requirements, I hereby give notice that the several parcels of land and water rights below described have been taken for the uses above indicated, viz:

(*a*) For extension of aqueduct.

1. It is proposed to take a right of way for a tunnel whose least depth below the surface of the ground will vary from 50 to 170 feet, as shown in detail by the longitudinal section on tracing *a*. The line of tunnel commences at the auxiliary gate-house of the distributing reservoir; thence north 81° 40′ 22″ east 20,826 feet to its eastern limit at the site of the proposed reservoir east of Howard University.

2. It is proposed to take and acquire title to the following tracts of land at the sites of the several shafts, viz:

39 At Foundry Branch, working shaft, about 3 acres, more or less, located in the valley of Foundry Branch, south of and fronting on the "New Cut" road.

At Fayette street, air shaft, a lot 50 by 100 feet fronting on Fayette street.

At Rock creek, working shaft, about 2½ acres on the left bank of the creek, extending about 1,000 feet down stream from the lower mill dam, and bounded on the east by the mill race.

At an air shaft, located about 1,400 feet west of the Columbia road, on tunnel line, a lot comprising about 5,000 square feet, more or less, and a right of way for a road 30 feet wide leading from the nearest public thoroughfare to said lot.

At Champlain avenue, working shaft, a lot fronting on Champlain avenue and comprising 40,000 square feet, more or less.

A roadway 60 feet wide and about 1,350 feet long from the auxiliary gate-house at the distributing reservoir to the intersection of the Foxhall lane and New Cut roads.

The several parcels of land referred to above are indicated by the spaces inclosed in green on tracing A. Their exact boundaries are not specified, because they can be modified within certain limits with a view to conforming, as far as practicable, to the wishes of the property owners.

(*b*) For reservoir near Howard University.

1. It is proposed to take and acquire title to about 67.8 acres of land lying in the depression east of Howard University, together with all improvements thereon, comprising property in Howard subdivision, and undivided property, as follows: Blocks 9, 10, 11, 22, 23, 24, 25, 26, with adjoining streets, and lots A, B, C, D, E, F, and lots 10 to 21, inclusive, all in block 16, together with that part of College street adjoining lots 10 to C, inclusive, in said block; also the Spring lot, belonging to the United States, containing about 0.4 acre; also, about 22.4 acres of undivided land, said to belong to the Howard University, 0.6 acre said to belong to the Soldiers' Home, and 20.3 acres said to belong to G. E. Moore. Also, a lot,*

*This lot is required for the construction of the valve chamber.

20 feet square, in the southwest corner of General Whittlesey's property.

2. It is also proposed to take a right of way 50 feet wide, and for such length as may be needed, to extend Four-and-a-half street (so called) from Boundary to and upon the property to be taken for the reservoir.

It is proposed to lay the large reinforcing mains along this line. The right of way through Le Droit Park has been promised, in writing, free of cost, and it already exists, as a public street, from there to the Howard University grounds. This will leave a length of about 360 feet to be condemned.

The lands referred to under this heading are shown on tracing B, indicated by the parts colored in green.

(*c*) Land for dam, etc., at Great Falls.

1. For extending the dam to and upon the Virginia shore, it is proposed to take and acquire title to a strip about 918 feet wide, crossing Conn's Island and the Virginia channel, and connecting the United States property on Falls Island and Hard-to-come-at with the United States property on the Virginia shore. This will extend the present limits of the United States property on the Virginia shore to the south by taking in a triangular lot containing about 0.8 acre.

This tract is colored in yellow on tracing C.

2. It is proposed to hold and acquire title to the lot on which the gate-house at the Great Falls now stands, containing about one-fifth of an acre.

This tract is colored in brown on tracing C.

It is proposed to take and acquire title to a tract connecting the gate-house lot with the United States property at Falls Island, containing about 2.6 acres. The influent conduit and a part of the dame are located on this tract, and the Chesapeake and Ohio canal passes through it. It is colored in green on tracing C.

4. In addition to acquiring to and for the United States any outstanding title to these lands at the Great Falls, it is also proposed to acquire all water rights implied in the possession of the same, or needed for purposes contemplated by the act under which these proceedings are taken.

The map of the surveys (in three tracings) required for the uses enumerated in the above-named act of 1882, chapter 294, may be seen at this Department by all claimants to any portion of said premises; and they are hereby respectively notified to file, within the period of the publication of this advertisement, in the Department of Justice, a description of the tract or parcels respectively by them claimed, and a statement of their value as by each claimant estimated.

BENJAMIN HARRIS BREWSTER,
Attorney General.

40 *Opinion of Court. Filed* 28 *July*, 1885.

In the Circuit Court of the U. S. for the 4th Circuit and the District of Maryland. In Equity.

THE GREAT FALLS MANUFACTURING COMPANY

vs.

AUGUSTUS H. GARLAND, U. S. Att'y General; WM. C. ENDICOTT, U. S. Secretary of War; Garrett J. Lydecker, George B. Chittenden, & Samuel H. Chittenden.

This motion for preliminary injunction is made upon a bill filed by the Great Falls Manufacturing Company, a corporation of the State of Virginia, against Augustus H. Garland, a citizen of Arkansas, now the Attorney General of the United States; William C. Endicott, a citizen of Massachusetts, now the Secretary of War of the U. S.; Garrett J. Lydecker, a citizen of New York, now major of engineers in the U. S. Army; George B. Chittenden, and Samuel H. Chittenden, citizens of the United States, now dwelling in the State of Maryland, contractors with said Secretary of War for the building of a dam and other structures across Conn's Island and
41 across the Potomac river from Conn's Island to the Virginia shore, and for the building of other structures and works in connection therewith on land alleged to belong to the complainant, near the Great Falls of the Potomac river, in Maryland.

The complaint of the bill is that, by virtue of a supposed authority granted by an act of Congress approved July 15, 1882, entitled an act to increase the water supply at the city of Washington and for other purposes, "the Secretary of War of the United States has taken possession of Conn's Island, belonging to the complainant, and of other land and water rights on the Potomac river belonging to the complainant, and through his agent, the said Lydecker, major of engineers, and through the said contractors, George B. and Samuel H. Chittenden, is occupying the same and building thereon a dam and other structures in disregard of complainant's ownership of said lands and water rights, and is occupying said land with sufficient force to prevent any opposition without a breach of the peace of the State of Maryland.

The want of lawful warrant for the acts complained of are by complainant's bill put upon two grounds: 1st, the unconstitutionality of the act of Congress of July 15, 1882; and, 2d, conceding the constitutionality of the act, upon the failure to pursue its terms.

The act, so far as it affects the property of the complainant,
42 provides that the Secretary of War shall cause to be made a survey and map of "the land necessary for a dam across the Potomac river at Great Falls, including the land now occupied by the dam, and the land required for the extension of said dam across Conn's Island to and upon the Virginia shore, and, when surveys and maps shall have been made, the Secretary of War and the Attorney General shall proceed to acquire to and for the United States the outstanding title, if any, to said land and water rights."

It is further provided that if it shall be necessary to resort to condemnation the proceedings shall be as follows:

"When the map and survey are completed the Attorney General shall proceed to ascertain the owners or claimants of the premises embraced in the survey, and shall cause to be published for the space of 30 days, in one or more of the daily newspapers published in the District of Columbia, a description of the entire tract or tracts of land embraced in the survey, with a notice that the same has been taken for the uses mentioned in this act, and notifying all claimants to any portion of said premises to file, within the period of publication, in the Department of Justice a description of the tract or parcel claimed and a statement of its value as estimated by the claimant. On application of the Attorney General the chief justice of the supreme court of the District of Columbia shall appoint three persons not in the employ of the Government or related to the claimants to act as appraisers, whose duty it shall be, upon receiving from
43 the Attorney General a description of any tract or parcel, the ownership of which is claimed separately, to fairly and justly value the same and report such valuation to the Attorney General, who thereupon shall, upon being satisfied as to the title to the same, cause to be offered to the owner or owners the amount fixed by the appraisers thereof, and if the offer be accepted, then, upon the execution of a deed to the United States, in form 'satisfactory to the Attorney General, the Secretary of War shall pay the amount to such owner or owners from the appropriation made therefor in this act.' * * *

"Any person or corporation having any estate or interest in any of the lands embraced in said survey and map who shall for any reason not have been tendered payment therefor as above provided, or who shall have declined to accept the amount tendered therefor, and any person who, by reason of the taking of said land or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right may, at any time within one year from the publication of notice by the Attorney General, as above provided, file a petition in the Court of Claims of the United States, setting forth his right or title and the amount claimed by him as damages for the property taken or injury sustained, and the Court shall hear and adjudicate such claims in the same manner as other claims against the United States are now by law directed to be heard and adjudicated therein, provided the Court shall make such
44 special rules in respect to such cases as shall secure their hearing and adjudication with the least possible delay.

"Judgments in favor of such claimants shall be paid as other judgments of said Court are now directed to be paid.

"Upon publication of the notice as above directed the Secretary of War may take possession of the premises embraced in the survey and map and proceed with the constructions herein authorized.

"Sec. 2. That the Secretary of War be, and he is hereby, authorized and directed to complete the dam at Great Falls to the level of 148 feet above tide and extend the same at that level across Conn's Island to the Virginia shore.

"The following sums, or so much as may be necessary, are hereby appropriated out of any money in the Treasury not otherwise appropriated: * * * To pay for water rights and land necessary to extend dam at Great Falls to the Virginia shore, $45,000."

The grounds upon which the constitutionality of this act of Congress is attacked are thus stated in complainant's bill:

And your complainant is informed and believes, and therefore avers, that even if the provisions of said act were ever so strictly followed by said Attorney General and said Secretary of War and the servants and agents, and their acts done in the premises in strict accordance therewith, yet their said acts and doings, as re-
45 gards your complainant, would not be justified in law, because said act is unconstitutional and void in its provions in these:

I. Said act makes no provisions by which reasonable compensation for the property taken for public use under its provisions can be constitutionally and lawfully adjusted and determined.

II. It does not provide that the compensation in its amount shall be ascertained by a verdict of a jury, which is a constitutional right of your complainant.

III. The act has provided that whatever wrong and injury may be done to your complainant in carrying on this public work, or in taking its land and water for such purpose of public use, that the only tribunal to which your complainant is compelled to have recourse for the adjudication of its rights is the Court of Claims, which is a court unknown to the Constitution, being neither a court of equity, such as was known to our ancestors at the time of the ratification of the Constitution, nor a court of common law, as said Court does not proceed by its constitution in the determination of cases according to the rules of the common law as known and practiced at the time aforesaid.

IV. That said Court of Claims is not other and different from a board of referees constituted by one party to hear and determine such cases as another party will consent to submit to judgment thereby, and even such judgment is not authoritative or binding against the party that chooses the board of referees. In ad-
46 dition to this, said act makes a limitation on the power of the referees to enforce any judgment against the United States, because it enacts that judgments of these referees to whom the act compels those whose property is taken for public use alone to resort shall be paid, as other judgments of said board of referees are to be paid, only when the judgment debtor pleases to pay them —*i. e.*, pleases to make an appropriation for that purpose.

V. In this: That the act directs property to be taken and entered upon and the owner dispossessed therefrom without any provision by which the compensation for taking said property can be paid, and this is done when neither the act nor the surrounding facts show any need of haste in so doing or any necessity which requires that property be taken until after an appropriation, at least, has been made for compensation for so doing.

With regard to the claim that complainant is entitled to have his

compensation assessed by a jury it has been so often decided that this is not a constitutional requisite that it cannot be any longer regarded as an open question.

In condemnations of private property for public use, in the exercise of the right of eminent domain, neither by the provisions of the Constitution of the United States guaranteeing the right of trial by jury in common-law cases nor under the provision forbiding a citi
zen being deprived of his property without due process o
47 law, nor under similar provisions in the constitutions of Statesf has it been held that a trial by jury is requisite. ,

It is stated to have been the fact that at the time of the adoption of the Federal Constitution it was the practice to assess condemnation damages by commissioners, arbitrators, or any other impartial tribunal. In Mills on Eminent Domains, 91, this is stated to be the result of a great number of adjudicated cases, and the same is also declared to be the rule in Cooley's Constitutional Limitations (563), with many references to authorities to support the test.

The language of the Supreme Court in U. S. *vs.* Jones (109 U. S., 519) would seem conclusive of this point. The Court says: "The proceeding for the ascertainment of the value of the property and consequent compensation to be made is merely an inquisition to establish a particular fact as preliminary to the actual taking, and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value and to be heard thereon."

And in Kohl *vs.* U. S. (91 U. S., 375), speaking of a condemnation of land by the U. S. for public purposes, the Supreme Court said: "Doubtless Congress might have provided a mode of taking the land and determining the compensation to be made, which would
48 have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the circuit court; but this, we think, was not necessary. The investment of the Secretary of the Treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjust a condemnation." And, discussing the question whether the proceeding was such an one as came within the general jurisdiction granted to the circuit courts, the Supreme Court says: "The right of eminent domain always was a right at common law. * * * That it was not enforced through the agency of a jury is immaterial, for many civil as well as criminal proceedings at common law were without a jury."

The contention of the complainant in this case, that the act of Congress is unconstitutional because it does not provide for the ascertainment of the value of the property taken through the verdict of a jury, cannot be maintained; and we think it equally clear

that there is no valid objection to the Court of Claims as a proper impartial tribunal designated by the act and possessed of all the requisite means to investigate and determine all the questions which can arise in respect to the complainant's claim.

The other objections, that the Court of Claims cannot render a judgment which can be enforced against the United States,
49 and that therefore no adequate and certain remedy is provided by which the complainant can compel payment, and the objection that the Secretary of War was authorized to take possession of the property as soon as the survey and map and publication of the notice thereof was made, we will consider hereafter.

We will next examine the grounds upon which it is urged that the acts of the officers of the Government are invalid because the terms of the act have not been pursued.

The complainant, by his bill of complaint, alleges, and your complainant is informed and believes, and therefore avers, that the Secretary of War and the Attorney General of the United States, claiming to act under and according to the provisions of said act to increase the supply of water to the city of Washington, and for other purposes, did not proceed to act in accordance therewith, or do the things requisite to enable said lands to be taken by the United States under the exercise of the right of eminent domain by the omission to do certain acts required to be done before said taking, and omitting to do the acts necessary for the legal taking of said lands and protecting the rights of your complainant and securing to it reasonable compensation for the property taken, as required by the Constitution of the United States.

I. They did not "proceed to acquire to and for the United States the outstanding title to said lands and water rights" of your complainant.

50 II. They resorted to condemnation of said lands and water rights when it was unneccessary so to do, and without notifying or calling on your complainant to consent to the acquiring said lands and water rights to and for the United States.

III. The Attorney General did not proceed before condemnation was attempted to ascertain the owners or claimants of said lands of your complainant.

IV. No survey or description of the water rights attempted to be condemned was made or published or inserted in any newspaper as a proceeding precedent to said condemnation, nor was any determination arrived at by said Attorney General or by any other person as to the amount of said water rights or water in said river which was to be condemned, nor did he give notice as to how much water was to be so taken by condemnation; whether a part or the whole of said river, so that the appraisers of the value thereof provided for by said act could not appraise the water to be taken. On the contrary, the only claim made by said Attorney General as to said land and water rights, or notified to your complainant, by publication or otherwise, was contained in a newspaper publication in the words and figures following:

"In addition to acquiring to and for the U. S. (*sic*) any outstand-

ing title to these lands at the Great Falls, it is also proposed to acquire all water rights implied in the possession of the same or needed for purposes contemplated by the act under which these proceedings are taken."

51 "The map of the surveys (in three tracings) required for the uses enumerated in the above-named act of 1882, ch. 294, may be seen at this Department by all claimants to any portion of said premises."

And your complainant says there is no intimation in said publication that said Attorney General and said Secretary of War were resorting to condemnation of said water rights or the land of your complainant at the Great Falls, because your complainant says, by the very terms of said publication, it was notified, not that its lands and water rights were to be condemned, but that, "in addition to acquiring to and for the U. S. (*sic*) any outstanding title to the lands at the Great Falls," it is also proposed to acquire all water rights implied in the possession of the same or needed for purposes contemplated by the act under which these proceedings are taken.

VII. And your complainant was misled by said notice as to whether it was intended to condemn its said land and water rights, whereas the notice required by said act, when it became necessary to resort to condemnation of lands and water rights, must "give a description of the tract or tracts of land embraced in the survey, with notice that the same has been taken for the uses mentioned in this act," thus notifying all claimants to any portion of said premises to file within its period of publication, in the Department of Justice, a description of the tract or parcel claimed and a statement of its value as estimated by the claimant."

52 And your complainant avers that it was impossible to comply with such notice as was given, or to give any description of water or water rights taken, which those taking had never described, even by specifying the quantity of water they desired to take during a given time, which is the usual and customary mode when water is to be diverted from a stream or river for a public use—that is to say, so many gallons or cubic feet by the minute, the hour, or the day.

And your complainant says that it was quite as impossible for it to comply with the statute under such notice "by filing a statement of the value estimated by the claimant" of an unknown quantity of water, which the Attorney General proposed to acquire.

And your complainant is informed and believes, and therefore avers, that the Attorney General, although he applied to the chief justice for the appointment of three persons to act as appraisers, as provided in said act, did not give them any description of any tract of land, the ownership of which is claimed severally, belonging to your complainant, that said appraisers might fairly and justly value the same, or any water rights, or intimation of water to be taken, nor did said appraisers value either land or water rights belonging to your complainant, nor has any amount been offered to your complainant therefor.

And your complainant is informed and believes, and therefore

avers, that no proper legal steps, as required by statute, were
53 duly taken by said Attorney General and Secretary of War, or either of them, or have been by their successors, or either of them, in said offices, which are requisite and necessary for the condemnation of said lands, or taking the same in due manner and form for public use, or for making compensation or causing compensation to be made therefor to your complainant.

And your complainant is also informed and believes, and therefore avers, that your complainant waited after several applications, both verbally and in writing, by its chief executive officer, made to said Attorney General and Secretary of War, till the last day before the expiration of the year limited by said act in which claims might be filed for damages under said act in the Court of Claims, hoping and expecting some steps might be taken by which the land and water rights belonging to your complainant might be legally taken by the United States, in such form that your complainant might obtain reasonable compensation for its property taken, and nothing being done, from great caution and fear lest the complainant might lose all benefit of any provision of said act by limitation, it then filed a petition setting forth its claim in order to save the rights of your complainant, and for no other purpose whatever. And your complainant protests that it believes that no sufficient steps have been taken in this regard to give said Court of Claims jurisdiction in the premises, because your complainant says all said acts of said Attorney General and Secretary of War and other servants of themselves and the United States in and about said lands and in
54 the premises were not justified by act of Congress, and therefore are simple trespasses and wrongs done to your complainant because of which and the injuries inflicted thereby said Court of Claims has no jurisdiction whatever.

And your complainant is informed and believes, and therefore avers, that although no notice of any taking has been given in the manner prescribed by law, and although no act has been done which would justify him in so doing, the Secretary of War, in the year 1883, by his servants and agents, wrongfully took possession of the lands of your complainant, claiming to have done so in behalf of the United States, in the State of Maryland and Virginia, which land was not within any description made, surveyed, or traced by the Secretary of War, and has used said land for the purpose of constructing a dam along a portion of said land across Conn's Island and over said river to the Virginia shore, and has built a large portion of said dam by means of his said servants and agents without making any bulk-head in said dam, or any provisions whatever by which your complainant can use any portion of the water for manufacturing or other valuable purposes, as was awarded by the arbitrators in their award as aforesaid in favor of your complainants, the dam to be constructed after the manner of plan A.

With regard to the objection that no survey was made and no description of the water rights designed to be appropriated and no proper legal steps taken to condemn the lands and water
55 rights of the complainant so as to condemn the same and

to give jurisdiction to the Court of Claims in respect to complainant's claim, we think it does sufficiently appear from the documents and plat exhibited to the court that a proper and intelligible survey was made and placed where it was accessible to the complainant, and was seen by those representing it, and that notice was published as directed by the act calling attention to the survey and map, and sufficiently describing the property of complainant which it was proposed to appropriate. We think it appears that the agents of the complainant had actual notice of all these matters, and the bill alleges, in substance, that they were the basis of several interviews between those agents and the Secretary of War and the Attorney General, in which the complainant made suggestions of a settlement of its claims which would have been accepted as satisfactory, but which the Secretary did not feel authorized to accept.

The objection most strongly urged is the alleged insufficiency of the notification with regard to the water rights, because the advertisement states generally that, in addition to the title to the land it was proposed to acquire "all water rights implied in the possession of the same or needed for the purposes contemplated by the act, the objection being that the notice did not state how much water it was proposed to divert from the Potomac river for the use of the proposed increased water supply, and that therefore it was impossible for the complainant to comply with the exigency of the notice and
56 of the act of Congress requiring the complainant to file in the Department of Justice a statement of the value of the property taken as estimated by the complainant."

There are two things definitely stated in the advertisement and ascertainable from the survey and map: one is the quantity of land to be appropriated and the other the nature and extent of the constructions to be placed on it and the height of the dam to be erected. The number of gallons of water to be diverted daily is not stated, but we think could be calculated from their data with sufficient accuracy for all *probable* purposes under the circumstances of this case, and with reference to so large a body of water with so great a flow as the Potomac river at the Great Falls.

It is also contended that the entry upon complainant's land was without warrant, because the Attorney General did not first have the land valued by appraisers, and did not offer the complainant the amount fixed by the appraisers.

The various difficulties which, in the opinion of the officers of the Government, attended the making of such an appraisement of the value of the land, water rights, and water which were taken from the complainant, and which, in their judgment, made it futile to attempt such a valuation, were mentioned in argument. Whether or not they were sufficient to dispense with an appaisement it does not seem to us material to consider, as we think that the survey and map and published notice were sufficient to make a case
57 under the act of which the Court of Claims could take jurisdiction, and that the complainant, by filing its claim in that Court asking compensation for the land, water rights, and

water appropriated, waived all objection to the preliminary steps for estimating that compensation.

The act prescribes that the claimant may file such a claim if for any reason the claimant shall not have been tendered payment or shall have declined to accept the amount tendered. It seems to us, therefore, that the complainant is now rightfully before a tribunal which can hear and adjudicate its claims, can consider the testimony of its witnesses, pass upon its titles and pretensions with respect to the water to be diverted from the river, and award the just compensation to which the complainant is entitled. It seems to us apparent that the agents of the complainant knew that the United States proposed to appropriate and were negotiating with the officers of the Government up to the time of filing the claim in the Court of Claims with regard to a proper settlement of the amount of compensation and could not agree with them. All, then, that was intended to be accomplished by the act in order to bring about an agreement and purchase, if possible, was attempted and failed, and we think that all that was necessary to give jurisdiction to the Court of Claims was done, and the case is now in that Court for determination, just as the act of Congress intended it should be if the parties could not agree as to the amount to be paid in compensation; and, as
58 the filing of the claim was the act of the complainant, we know of no reason why it should not be held a waiver by it of merely formal, antecedent matters.

It remains, then, to consider whether the act of Congress is unconstitutional, employes of the Government trespassers; because, without having paid the compensation and without completing the proceedings to ascertain the amount of compensation, possession was taken of the premises embraced in the survey and the construction of the work proceeded with.

In Cooley on Constitutional Limitations (560) it is said to be the rule, deducible from adjudged cases, that unless there is some constitutional or legislative requirements it is not essential to the validity of a law for the exercise of eminent domain that provision should be made for payment of compensation before the actual taking of the property, where the taking is by the sovereign power itself, and that when the taking is by the State itself, not by a private corporation under authority from the State, it is sufficient if provision is made by the law by which the party whose property is taken can obtain compensation and an impartial tribunal provided for assessing it. The same rule is given as the result of the authorities in Mills on Eminent Domain, 126, and in Potter's Dwarris on Statutes, page 391.

It must be acknowledged that this doctrine goes to the verge of what can be sanctioned without destroying the essential right of the citizen to have just compensation secured to him before his
59 property is entered upon and he is dispossessed. But there are numerous cases reported in which the courts have relaxed the strict rule applicable for private corporations in favor of the sovereign power itself where the Legislature has deemed the importance and urgency of the public use sufficient to call for taking

the property before the compensation is ascertained, and where the solvency of the State was undoubted, its good faith unquestioned, an adequate method of ascertaining the compensation provided which the party could pursue of his own motion, and the delay in payment only there caused by the unavoidable checks and precautions with regard to payments and expenditures of public moneys. (Haverhill Bridge Co. *v.* County Com'rs, 103 Mass., 125.)

The present case is one in which all the reasons which have induced the courts to relax the rule requiring payment to precede entry apply very strongly. The land and water rights of the complainant in question were not and never have been used in any beneficial manner whatever, but have remained unimproved and vacant. The complainant admits that it is willing and anxious to sell to the United States whatever of its property and rights may be required for the proposed water supply in order that it may get the price, and also in order that it may hold the balance of its property unclouded by the uncertainty as to how much may be required for this public work, which it is obvious sooner or later must be carried out. All the complainant desires is to obtain payment for what it does not now use itself, and which it is clear the Government ought to take.

59½ The officers of the Government, knowing that in any event the water supply must be taken from the Great Falls of the Potomac, without waiting for the completion of the proceedings by which the compensation was to be ascertained, proceeded, as directed by the act of Congress, to construct the dam and other works. This application for injunction is made some eighteen months after these works were commenced and after contracts have been made, costly coffer-dams put down in the river, and other expensive preparations made for pushing the work during the summer months. If the injunction should now issue and the work be interrupted until the meeting of Congress much of this large expenditure will be sacrificed. Without, therefore, undertaking to sanction any rule by which in general property may be taken into possession without compensation first being made, even when not expressly forbidden by constitutional or legislative provision, it does seem to us that this is a case in which we should decline to interfere by injunction at this time if the means provided by the act of Congress to ascertain the amount of compensation are adequate and proper and the payment of the amount when ascertained reasonably provided for and assured.

The only remaining question, then, is as to the provision of the act of Congress that the "judgments of the Court of Claims in favor of the claimants shall be paid as other judgments of said Court are now directed to be paid."

60 That is to say, the judgment may be paid out of any appropriation made by Congress for the payment of such claims as have been established by that Court.

It is urged that after the judgment of the Court of Claims has been obtained the failure of Congress to pass a law appropriating money to pay the judgment would defeat the complainant's efforts to get payment for its property. This is true, but it is also true

that Congress always has heretofore appropriated the money required to pay the judgments of the Court of Claims, and, as it has specially designated this Court as the tribunal to ascertain what amount shall be paid to the complainant, nothing but a flagrant breach of good faith could delay the payment. The possibility of such action on the part of Congress, under all the circumstances of this case, we do not think sufficient to justify the issuing of a preliminary injunction.

If the complainant is so advised this cause may be continued so that hereafter, if it should indeed prove to be true that a certain and adequate provision has not been made for payment of the amount which shall be ascertained to be due to the complainant, the further action of this court may be invoked.

The application for a preliminary injunction is denied.

HUGH L. BOND,
C't Judge.
THOS. J. MORRIS,
Dist. Judge.

Copy.
Test: JAS. W. CHEW, *C'lk.*

61 *Demurrer to Bill. Filed* 14 *October*, 1885.

In the United States Circuit Court for the District of Maryland, the 13th day of October, 1885.

THE GREAT FALLS MANUFACTURING COMPANY
vs.
AUGUSTUS H. GARLAND, U. S. Attorney General; WILLIAM C. ENDICOTT, U. S. Secretary of War; Garrett J. Lydecker, George B. Chittenden, Samuel H. Chittenden.

The demurrer of the above-named defendants, Augustus H. Garland, U. S. Attorney General; William C. Endicott, U. S. Secretary of War; Garrett J. Lydecker, George B. Chittenden, and Samuel H. Chittenden to the bill of complaint of The Great Falls Manufacturing Company, the above-named plaintiff.

These defendants, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill, and for cause of demurrer show that the said bill doth not contain any matter of equity whereon this court can ground any decree or give to the plaintiff any relief against these defendants, or any of them.

Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants do demur thereto and de-
62 mand the judgment of this court whether they, or any of them, shall be compelled to make any further or other answer to said bill, and pray to be dismissed with their costs and charges in this behalf most wrongfully sustained.

JOHN GOODE,
Sol. Gen., Counsel for Defendants.

I certify that in my opinion the above demurrer is well founded in point of law.

JOHN GOODE,
Sol. Gen'l.

The defendants' affidavit that above demurrer is not interposed for delay is hereby waived.

BENJ. F. BUTLER,
Of Counsel for Plaintiffs.

63 *Joinder in Demurrer. Filed* 14 *October*, 1885.

In the United States Circuit Court for the District of Maryland, the 13th day of October, 1885.

THE GREAT FALLS MANUFACTURING COMPANY
vs.
AUGUSTUS H. GARLAND, U. S. Attorney General, and Others.

The plaintiff hereby joins issue on the defendants' demurrer.

O. D. BARRETT,
Of Counsel for Plaintiff.

Stipulation of Counsel. Filed 14 *Oct.*, 1885.

DEPARTMENT OF JUSTICE,
WASHINGTON, *Oct.* 13, 1885.

It is hereby stipulated and agreed by and between the counsel for the plaintiff and the counsel for the defendants in the case of the Great Falls Manufacturing Company *vs.* Augustus H. Garland, U. S. Attorney General, and others, pending in the circuit court of the United States for the district of Maryland, that the defendants' demurrer be submitted to the court without argument by either
64 party to said cause, and that if either party shall see fit to appeal from the decree that may be rendered on said demurrer to the Supreme Court of the United States such an appeal may be taken without filing any bond for costs, &c.

JOHN GOODE, *Sol. Gen'l,*
Counsel for Deft's.
BENJAMIN F. BUTLER,
Of Counsel for Plaintiff.

Order to Set Cause for Hearing. Filed 14*th Oct.*, 1885.

In the Circuit Court of the United States for the District of Maryland, the 13th day of October, 1885.

THE GREAT FALLS MANUFACTURING COMPANY
vs.
AUGUSTUS H. GARLAND, U. S. Attorney General, and Others.

The clerk will please set the above-entitled cause for hearing on demurrer, and notify the court that the parties submit the same without argument, as per stipulation of counsel.

O. D. BARRETT,
Of Counsel for Pl't'f.

65 *Letters of Clerk U. S. Circuit Court, Hon. John Goode, Sol'r Gen'l, and Gen'l Benj. F. Butler. Filed 16th July,* 1886.

CLERK'S OFFICE, U. S. COURTS,
BALTIMORE, MD., *November 10th,* 1885.

Hon. John Goode, Sol'r Gen'l, U. S.

DEAR SIR: Judges Bond and Morris were in court to-day, and had before them the matter of the demurrer in the Great Falls Manufacturing case. They desire me to write that there were some facts which were made to appear at the hearing of the motion for a preliminary injunction, and which are a denial or explanation of some of the averments of the bill, which ought to be admitted before the demurrer is sustained, as they were considered as proved or admitted at the hearing for injunction.

1. The facts stated in the affidavit of Major Lydecker.

2. That the Secretary of War did cause to be made the survey and map of the land to be taken for the extension of the dam across Conn's Island to the Virginia shore which was produced and exhibited to the court at the hearing.

3. That the officers of the Government are not building the
66 dam to a greater height than 148 feet above mean tide. This was understood to be conceded at the hearing.

4. That the advertisement, a copy of which is appended to the communication addressed by the Att'y Gen'l to the President of the Senate, dated January 20th, 1885 (48th Congress, 2nd session, Ex. Doc. No. 48), was published, as stated in that communication.

The court understood these to be facts conceded at the hearing, and the judges think they should be admitted by agreement for the purposes of the demurrer, in order that the case, which was argued before them, may go to the Supreme Court.

Very resp'y, JAS. W. CHEW, *Clk.*

(Copy of above mailed to O. D. Barrett, Esq., sol'r for compl't, same day.)

Sol. Gen'l. W. J. H.

If any further correspondence on this subject quote the above initials. 7279.

DEPARTMENT OF JUSTICE,
WASHINGTON, *November 11th,* 1885.

James W. Chew, Esq., clerk, clerk's office United States courts, Baltimore, Md.

SIR: Yours of the 10th instant has been received, and the stipulation will be forwarded as soon as I can have an opportunity to confer with the plaintiff's attorneys.

Very respectfully, JOHN GOODE,
Solicitor General.

67 Sol. Gen'l. W. J. H.

If any further correspondence on this subject quote the above initials. File No. 7279, 1885.

DEPARTMENT OF JUSTICE,
WASHINGTON, *July 13th*, 1886.

Hon. Hugh L. Bond, circuit judge United States, Baltimore, Md.

DEAR SIR: On the 10th day of November, 1885, I received a letter from James W. Chew, Esq., clerk of the United States court at Baltimore, in which he stated that Judge Morris and yourself, after considering the matter of the demurrer in the Great Falls Manufacturing case, desired him to write that there were certain facts made to appear at the hearing of the motion for a preliminary injunction which ought to be admitted before the demurrer is sustained, as they were considered as proved or admitted at the hearing. Upon the receipt of that letter I prepared a stipulation covering all the points referred to, and submitted it to the opposing counsel, but, after repeated conferences on the subject, we have been unable to come to an agreement. Under these circumstances, I have to request that the court will proceed to pass upon the demurrer as they may be advised.

Very respectfully, JOHN GOODE,
Solicitor General.

68 Hon. Hugh L. Bond:

As counsel for the plaintiff I heartily concur with the Solicitor General in asking the circuit court to determine the questions submitted to it upon the record as it stands, and ask for a speedy determination. I am unable to agree to the existence of facts which do not exist, even when I have the inducement of speeding an important cause by so doing. Renewing my concurrence with the counsel for the defendant in his request to have the cause speedily decided on the record,

I remain, very respectfully, your obedient servant,
BENJ. F. BUTLER.

69 *Decree Sustaining the Demurrer and Dismissing the Bill. Filed 16 July*, 1886.

In the Circuit Court of the U. S. for the District of Maryland.

THE GREAT FALLS MANUFACTURING CO.

vs.

AUGUSTUS H. GARLAND, U. S. Att'y General, and Others.

The demurrer to the bill of complaint having been submitted without argument, and the court being of opinion that said demurrer should be allowed, it is thereupon, this 16th day of July, 1886, ordered, adjudged, and decreed that the defendants' demurrer to the bill of complaint be, and the same is hereby, sustained, and the com-

plainant not desiring to amend its bill of complaint the same is hereby dismissed with costs to the defendants.

THOMAS J. MORRIS, *Judge.*

70 *Prayer of Appeal and Allowed. Filed* 28 *July*, 1886.

In the U. S. Circuit Court, District of Maryland. In Equity.

GREAT FALLS MANUF'G CO.

vs.

AUGUSTUS H. GARLAND, Att'y Gen'l, *et al.*

The complainant, by its solicitor, prays an appeal to the Supreme Court of the United States from the decree in the above-entitled case sustaining the demurrer and dismissing the bill.

BENJ. F. BUTLER,
Solicitor for Compl't.

Let the appeal be allowed.

THOMAS J. MORRIS, *Judge.*

71 *Citation Waived. Order Filed* 2 *Aug.*, 1886.

So'l Gen'l. W. J. H.

In any further correspondence on this subject quote the above initials. File No. 7279, 1885.

DEPARTMENT OF JUSTICE,
WASHINGTON, *July* 28*th*, 1886.

Hon. Benjamin F. Butler, No. 6 Ashburton Place, rooms 1, 4, 5, and 6, Boston, Mass.

DEAR SIR: I have the honor to acknowledge the receipt of your communication of the 26th instant, in which you notify me of your purpose to claim an appeal from the decision of the circuit court of the United States, at Baltimore, sustaining the demurrer in the case of the Great Falls Manufacturing Company *vs.* Augustus H. Garland, United States Attorney General, and others. In accordance with your request, I hereby waive a formal citation to the defendants upon the allowance of the said appeal.

Very respectfully, JOHN GOODE,
Solicitor General.

Thereupon it is ordered by the court here that a transcript of the record and proceedings in the said cause be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the second Monday of October next, and the same is transmitted accordingly.

Test: JAS. W. CHEW, *C'lk.*

72 UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

I hereby certify that the foregoing is a true transcript of the record and proceedings in the therein-entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the circuit court of United States for the fourth circuit, in and for the district of Maryland, on this 7th day of August, A. D. 1886.

[The Seal of the Circuit Court, Maryland.]

JAS. W. CHEW,
Clerk of said Circuit Court.

Endorsed on cover: Maryland C. C. U. S. No. 960. The Great Falls Manufacturing Company, appellant, *vs.* Augustus H. Garland, Attorney General of the United States, *et al.* Filed August 17, 1886.

124-581.

RECEIVED
DEC 17 1887
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 605. October Term, 1887.

THE GREAT FALLS MANUFACTURING COMPANY,
Appellant,

v.

AUGUSTUS H. GARLAND, ATTORNEY-GENERAL OF THE UNITED STATES, et als.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR APPELLANT.

B. F. BUTLER,
O. D. BARRETT,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

GREAT FALLS MANUFACTURING CO.,
APPELLANT,
v.
A. H. GARLAND ET ALS.

In Equity,
No. 605.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

A bill in equity against the defendant GARLAND, ATTORNEY-GENERAL, the defendant ENDICOTT, SECRETARY OF WAR, and the defendant LYDECKER, Major of Engineers in charge of the dam and other structures to be made on the lands of the ORATOR, and GEORGE B. CHITTENDEN and SAMUEL H. CHITTENDEN, contractors for building the dam on said land.

The ORATOR, the Great Falls Manufacturing Company, was established by the laws of Virginia, and was possessed in fee of certain lands and water powers and rights, as well in Maryland as in Virginia, under concessions by the laws of two States, and Conn's Island, lying in the waters of Potomac river, near Great Falls in Maryland, extending northerly and southerly up and down said river about one-half mile.

The gravamen of the complaint of the bill is, that the defendants, acting for and in behalf of the United States, had taken possession of your Orator's land under an Act of Congress of July 15, 1882, without payment or tender of payment to your Orator for the land and water rights taken, and were completing a dam which the plaintiff alleged had been many years before fully adopted by the United States, according to a plan known as "plan A," hereinafter

set out and described, for building a dam at Great Falls, without being justified in so doing by due process of law; and remedy was paid therefor both by injunction and by the further action of the Circuit Court of the United States for the District of Maryland wherein the land lies. The defendants justified under the Act of Congress of July 15, 1882, being an Act to increase the water supply of the CITY OF WASHINGTON, and for other purposes, which Act will be found on p. 1 of the Appendix to this brief, where will be found copies of all the statutes, facts, and documents to which it is believed the Court will have occasion to refer. Some of the more important ones are inserted in the body of the brief. The findings of the Court of Claims referred to in the bill as part thereof are also placed in the Appendix.

The Bill in Equity in this cause being filed, the defendants, being duly served, came in and submitted to the jurisdiction of said Circuit Court, and demurred generally to the bill, that it "doth not contain any matter of equity" (Rec., p. 46), without setting forth any special grounds of demurrer. The cause was heard in the Circuit Court solely upon the demurrer. This course admits all the facts properly pleaded in the bill and, in addition thereto, all the facts relative to the title and condition of the estate of the Orator and all the acts of the United States and its officers relating thereto, as are found by the Court of Claims, as reported in United States *v.* The Great Falls Manufacturing Co., 112 U.S. R., p. 465, which are referred to as part of the bill (Rec., p. 8).

Bill was filed May 5, 1885.

A motion for preliminary injunction was made and denied; July 29 an opinion on that motion was filed (Rec., p. 36), and is the only opinion of the Court in the case. The affidavit of defendant Lydecker (Rec., p. 22), the facts of which were denied (see Butler's letter, Rec., p. 49), was used in the injunction hearing, but is no part of the case, and ought not to be in the record.

STATEMENT OF FACTS AND INFERENCES TO BE DRAWN THEREFROM.

August 31, 1852, Congress passed an Act appropriating $5,000 "to enable the President to cause the necessary surveys, projects,

and estimates to be made for determining the best means of affording the cities of Washington and Georgetown an unfailing and abundant supply of good and wholesome water, — report thereof to be made to Congress at its next session." (10 U.S. Stat., 92.)

March 3, 1853, the President's report having been made in part, Congress made an "appropriation of $100,000, to be expended, under the direction of the President, for the purpose of bringing water into the city of "Washington" upon such plans and from such places as he may approve, provided that, if the plan adopted by the President of the United States should require *water to be drawn from any source within the limits of Maryland, the assent of the Legislature of that State should first be obtained.*" (10 U.S. Sts., 206.)

Whereupon, under the direction of the Secretary of the Interior, the engineer officers of the United States entered upon a part of the *locus de quo*, for the purpose of building an aqueduct to take a water supply to the CITY OF WASHINGTON; but, before the construction of any dam was begun, your Orator applied to the Head of the proper Department to have the compensation to which it was entitled for injury done, or to be done, to its property ascertained, whereupon the Head of the proper Department, as directed by the joint resolution of Congress, passed September 11, 1841 (5 Sts. A. L., 468), made application to the Legislature of Maryland for an act of assent, which was contemplated in the Act of March 3, 1853, before cited, which act of assent was passed in the following words: —

"AN ACT giving the assent of the State of Maryland to such "plan as may be adopted by the President of the United States for "supplying the CITY OF WASHINGTON with water.

"WHEREAS, the Congress of the United States have appro- "priated the sum of one hundred thousand dollars for the purpose "of supplying the CITY OF WASHINGTON with water, upon such plan "as the President of the United States may approve, on the condition "that if such plan should require said water to be drawn from any "source within the limits of the State of Maryland the assent of that "State should first be obtained; and whereas, by a joint resolution of "Congress, passed in September, eighteen hundred and forty-one (5 "Sts., 468), it is provided that no public money shall be expended "upon any land or site hereafter to be purchased for the United States, "until the consent of the Legislature of the State, in which the land

"or site may be, shall be given for such purpose; and as it is also "made the duty of the Secretary or Head of the proper department "to apply to said Legislature for a cession of the necessary jurisdiction "over said lands: Therefore, —

"SECTION 1. Be it enacted by the General Assembly of Mary- "land, That if the plan adopted by the President of the United "States for supplying the CITY OF WASHINGTON with water, should "require said water to be drawn from any source within the limits "of the State, consent is hereby given to the United States TO "PURCHASE SUCH lands, and to construct such dams, reservoirs, "buildings, and other works, and to exercise concurrently with the "State of Maryland such jurisdiction over the same as may be "necessary for the said purpose.

"SECT. 2. And be it enacted, That if the United States, "acting through such agent as may be appointed for that purpose, "cannot agree with the owners for the purchase of any land which "may be required for the purpose aforesaid, or for the purchase of "any earth, timber, stone, or gravel to be found thereon, which "may be required for the construction of said works, or in case "the owner thereof should be a *femme covert*, or under age, *non* "*compos mentis*, or nonresident of the State, it shall nevertheless "be lawful for the United States to enter upon such lands, and to "take and use such materials, after having first made payment or "tendered payment for the same at the valuation assessed thereon in "the manner hereinafter prescribed.

"SECT. 3. And be it enacted, That in the condemnation and "assessment of such lands and materials as may be necessary for "said purposes, the LIKE PROCEEDINGS IN ALL RESPECTS shall be "had as by existing laws are required for the condemnation and "assessment of lands and materials for the use and construction of "the Chesapeake & Ohio Canal and the works appurtenant thereto.

"SECT. 4. And be it enacted, That nothing in this Act shall "be so construed or understood as to authorize the United States "to interfere with the rights now vested in the Chesapeake & Ohio "Canal Company, or with the rights granted by said Company to "individuals.

"SECT. 5. And be it enacted, That this Act shall take effect "whenever the United States shall agree to such conditions as the

"Chesapeake & Ohio Canal Company may consider necessary to "secure the canal from injury in carrying into effect any plan that "may be adopted for supplying the CITY OF WASHINGTON with "water, as aforesaid.

"Passed May 3, 1853."

By the third section, therefore, Maryland directed that compensation for the taking and condemnation of land and water should be through the means of a "sheriff's jury, who should fix the compensation," as in case of the Chesapeake & Ohio Canal Company.

For the purpose of constructing the aqueduct and dams, between March, 1853 and June 12, 1858, Congress appropriated $2,400,000. (See appropriations, Appendix, p. 6.)

July 27, 1858, the United States applied to a Justice of the Peace in Montgomery Co., Md., to issue his warrant summoning a "jury to meet on the piece of land described in the warrant (the *locus de quo*) to faithfully, impartially, and justly value the said piece of land bounded in the warrant, as of an absolute estate in perpetuity, and all damages the owner and owners thereof have sustained and shall sustain, by erecting and constructing said dam for the Washington Aqueduct, the warrant reciting that the head or principal dam of the aqueduct "*is intended to be constructed across the bed of the Potomac river, and also across an island in said river, at or about the Great Falls, named Conn's Island, lying in said county, which land is claimed in part or whole by the Great Falls Manufacturing Company.*"

And your orator being summoned before said jury, answered the United States on their claim of purchase. The jury sustained the same, and assessed the damages in the sum of $150,000. (11th Finding of Fact, Appendix, p. 7.)

November 8, 1858, the United States moved the County Court to set aside the verdict. March 10, 1859, the verdict was set aside and a *venire de novo* was ordered in the manner prescribed by the original warrant. (11th Finding of Fact).

The United States did nothing under this order of the Court.

One ground for setting aside the inquisition was, that a part of the water taken ran over from the Virginia side of the river to the

aqueduct on the Maryland side, and a Maryland jury had no jurisdiction over Virginia water.

March 9, 1859, Congress placed this work under the control of the Secretary of the Interior. (11 Stat. at L., 435.) Nothing was done in the matter of condemnation or compensation until November 20, 1862, when a submission to arbitration was entered into between the Secretary acting for the United States, and the Company, which recited the claims of the parties, and that "the means of condemnation proving unavailing from the want of adequate legislation upon the part of the States of Maryland and Virginia, and the intrinsic difficulty of the case, and that the party of the first part (the United States) is anxious to prosecute this great work, with as little delay as possible, now, then, with a view to a prompt, fair, and final settlement of this controversy, it is agreed between said parties as follows:" "That all the claims of the Company for compensation or damages for the *occupation and use of the party of the first part*, of any land *or water rights and privileges claimed* by the party of the second part, shall be submitted to the arbitrament of five arbitrators, two of whom were B. R. Curtis and Geo. M. Dallas, the award of a majority of whom shall be final and conclusive, except that if either party was dissatisfied with the award it should within thirty days file a bill in equity in the Circuit Court of the District of Columbia to set it aside with the right of either party to appeal within thirty days. And the farther exception, that the award of the arbitrators should not be binding upon the United States unless the Attorney-General shall decide that the second party, the Company, had a valid title to said land. (12th Finding of Fact, Appendix, p. 7.)

At the time of the organization of the arbitration the works had not been completed, so far as a dam was concerned. Four different plans for the works, prepared by the engineer officers, acting under the Secretary of the Interior, were submitted to the arbitrators as a part of the Government's case, showing the amount of land and water to be taken under each plan of the proposed taking or occupation. The arbitrators heard the parties fully, and the Government agreed, through its Attorney-General, as a part of the case, that the title of the company should be submitted to the arbitrators.

On the 28th of February, 1863, the arbitrators filed their award, fixing the compensation which the Company should have, if the

water-works were constructed according to either of the four plans submitted to them: For the first (Plan A), $63,766; for the second (plan B), $50,000; for the third (plan C), $77,200; and for plan "Fourth," $15,692. They also decided that the Company's titles were valid and satisfactory. They further decided that in case the first plan (plan A) should be adopted and carried out, it should be upon conditions as follows: "But this assessment is based upon the condition that the said Company, as against the United States, may lawfully build and maintain a canal and bulkhead across and upon the land of the United States on the Virginia shore of the Potomac river, marked on said plan number four as belonging to the United States, so as to use the water of the pool above the dam A, subject to the superior right of the United States to use the water for the aqueduct in the manner and to the extent shown by the aforesaid specifications of said dam A, and its corresponding plan of operations."

If the second plan (plan B) was adopted, then no privileges in addition to the $50,000 compensation was provided for, none being needed, inasmuch as that dam would have been so constructed that water could have been drawn direct by the Great Falls Company from it through its canal, said dam terminating on the Virginia side at the head of said canal.

In case the third plan (plan C) was adopted, the following condition was added: "This assessment is based upon the condition that said Company, as against the United States, may lawfully build and maintain a canal upon and across the land of the United States on the Virginia shore of the Potomac river marked on said plan number four as land of the United States, so as to use the water of the pool above the dam C, subject to the superior right of the United States to use the water of the aqueduct in the manner and to the extent shown by the aforesaid written specifications of said dam C, and its corresponding plan of operations." If plan four was adopted, then no condition was annexed to the same in favor of the Company beyond the compensation awarded, namely, $15,692. That dam only crossed from Conn's Island to the Maryland shore, over the Maryland channel, about one-third of the width of the river, and did in no way interfere with the main channel of the river. In case the first plan (plan A) was adopted, the "Fourth"

plan would have been a portion of plan A, so far as it concerned the dam and the channel between the Maryland shore and Conn's Island.

No bill in equity has ever been filed by the United States to set aside the award.

The attorney-general gave no opinion as to title. Why he should do so is not plain, after he had submitted the question of title to the arbitrators. (12th Finding of Fact.)

July 4, 1864, Congress appropriated "$150,000 for the purpose of constructing a solid masonry dam across the Maryland branch of the river, and for paying existing liabilities." (See Appropriations, Appendix, p. 6.) July 30, the Government made a contract for constructing a dam according to plan "Fourth," and proceeded to occupy the Company's land as required under this plan, and have ever since drawn the water required for Washington and Georgetown from the Maryland channel, finishing the work in 1867.

Your Orator applied to a subsequent Secretary to cause the award to be carried out by the United States. He refused so to do, on the ground, *first*, that his predecessor had no power to make such submission to arbitration, and he therefore could not expend the public money to answer the award in matter of compensation. He did, however, find authority to pay $12,761.84, referee's fees, commissioner's and witness fees, awarded by the same arbitrators, as well as fees of counsel for the United States, amounting to more than the compensation to the appellant required by plan "Fourth," to wit, $15,692.

Second, the Secretary objected that the attorney-general had not certified the title, but he does not say he ever asked him to do so. (12th Finding of Fact, Appendix, p. 7.)

Nothing further was ever done by the Government to compensate the Company. April 10, 1868, a petition was filed in the Court of Claims for the enforcement of the award, and for compensation for taking the water to a greater extent than was called for by the claim according to plan "Fourth."

That petition was resisted by the Government on three grounds: *first*, the want of authority in the Secretary of the Interior to make the submission. *Second*, that if authorized the award was invalid, because the attorney-general had not certified the title; and, *third*,

the doings of the United States officers in taking possession were simple trespasses, which conferred no right upon the United States to the lands, or jurisdiction on the Court of Claims. (See Opinion Great Falls Co. *v.* United States, *ubi supra.*)

This case remained pending in the Court of Claims until the year 1881, when judgment was given in favor of your Orator, finding every fact set forth in this present bill as occurring before that date, from which an appeal was taken to this Court, wherein the judgment was affirmed. (112 U.S. R. 645.)

Thus it will be seen that, by a valid award sustained by this Court, the United States, whenever it chooses, may enter on and "occupy" the land, and hold back the water of your Orator by means of a dam constructed on its lands for the purpose of raising the water to be diverted to supply the City of Washington, substantially in the manner set forth in plan A, and then, and in that case, the United States ought to pay therefor, as compensation, the sum of $63,766, and do such things for the benefit of the complainants as are set forth as conditions in said award.

CAN THE UNITED STATES, BY LAW, TAKE AWAY THE RIGHTS OF THE CITIZEN THUS SECURED BY CONTRACT, BY LEGISLATION AND JUDGMENT OF A TRIBUNAL TO WHICH IT HAD AGREED, AND WHICH HAS BEEN SUSTAINED BY ITS OWN COURT OF CLAIMS AND THIS COURT?

We have now stated the condition of the appellant's title and rights, so far as they are affected by the action of the United States and its officers prior to the Act of Congress of July 15, 1882, and the doings of the officers of the United States thereunder, which are the specially unjustifiable injuries complained of in this bill, which are hereinafter to be set forth.

The first question which arises at this stage is: —

WHAT IS THE LEGAL EFFECT OF THE FIRST ACTION OF CONGRESS AND MARYLAND?

As we have seen, the United States, in obedience to the requirement of the Constitution (Article I., Section 8): "To exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of

forts, magazines, arsenals, dockyards, and other needful buildings"; and in pursuance of the power of Congress, limited to itself, by its joint resolution of September, 1841, Congress March 3, 1853, appropriated one hundred thousand dollars, "to be expended under the direction of the President of the United States, for the purpose of bringing water into the CITY OF WASHINGTON [only] upon such plans, and from such places, as he may approve, provided that if the plan adopted by the President of the United States should require water to be drawn from any source within the limits of Maryland, the assent of the Legislature of that State shall first be obtained." That assent was given, as we have before stated, upon certain conditions precedent which we have above set forth. The United States, claiming to act under that assent of Maryland, tried through its officers to purchase the lands of the appellant in Maryland, and for that purpose proceeded to have the condemnation made and damage fixed according to the law of Maryland.

That proceeding, as we have seen, proved abortive, but the officers of the United States entered upon the lands of the appellant, occupied them, and built a dam from the westerly shore of Maryland to Conn's island, which is within the limits of Maryland, no other legislation on the part of Maryland or of Congress ever having been had as to the rights of the United States in said lands until the Act of 1882, which is to be considered hereafter.

A portion of the land of the State of Maryland, near Great Falls, and a part of them, was tried to be bought by your orator of the State itself. This purchase was made while the proceedings under the submission and award were *in fieri*. The United States took proceedings against the Company to restrain it from such purchase. That contention was carried to the Court of Appeals of Maryland, and the consideration to be given to the Act of Congress and the Act of Maryland, in regard to the land which the Great Falls Company attempted to purchase, was brought in question; and the Maryland Act was held to be in full force, and with the Act of Congress, to constitute a "solemn compact" between the United States and the State of Maryland in regard to these lands. (United States *vs.* Great Falls Manufacturing Company, 21 Maryland, 119. See also Reddall *vs.* Bryant, 14 Maryland, p. 444.) And the appellant was prevented from acquiring those lands because of that compact.

What was that compact? It was that the United States asked the assent of Maryland, which she gave, that the United States might purchase and occupy certain lands for a given purpose under conditions that the United States, in purchasing of her citizens, should have compensation for their lands fixed, if no agreement with the owners was made, by a jury, as between parties under the laws of Maryland. This part of the compact cannot be set out better than by again quoting the second section of said of assent Act: —

"And be it enacted, That if the United States, acting through such agent as may be appointed for that purpose, cannot agree with the owners for the purchase of any land which may be required for the purpose aforesaid or for the purchase of any earth, timber, stone, or gravel, to be found thereon, which may be required for the construction of said works, or in case the owner thereof should be a *femme covert* or under age, *non compos mentis*, or non-resident of the State, it shall, nevertheless, be lawful for the United States to enter upon such lands, and to take and use such materials, after having first made payment or tendered payment for the same at the valuation assessed thereon in the manner hereinafter prescribed."

In utter defiance of the provisions of said Act the United States took possession of said land, made no agreement with the parties, except an agreement that it carefully broke, the submission to arbritration, tendered no payment, abandoned all steps under the law of Maryland, and seized upon the property of its citizens, and built a dam thereon, and diverted the water from their use to the use of the cities of Washington and Georgetown. And since that, in the cases above cited, in the 14th and 21st Maryland Reports, the United States invoked that compact thus made, and thus violated by it in its own favor in regard to the lands of the Company, and still holds these lands by virtue of that compact, as declared by the Court of Jurisdiction of Appeals.

This brings a new consideration as to the title of these land and and water-rights of this Company. Without insisting, as we may, and ought, upon the estoppel which prevails against the United States, as well as everybody else, to do anything in contravention of its solemn compact, is it not certain that the United States can do nothing by law, or in any other way, with these lands in derogation of a decree of the Court in its own favor, setting up a compact

which secures these lands never to be taken away from a citizen of Maryland, except in accordance with the conditions of assent of the State, which is a part of that compact.

As bearing upon this title certain other very remarkable facts claim the careful attention of the Court. They are found in the 12th Finding of Fact (App. p. 7). We had title to certain lands in Maryland and Virginia, and water-rights belonging thereto. The United States wished to use those lands and the water to be raised by means of a dam in the Potomac river, for the purposes of the "City of Washington." They asked the assent of Maryland to purchase those lands of its citizens for that purpose only. The State of Maryland gave its assent upon certain conditions as to the manner in which the purchase should be made. The United States attempted to purchase the land under those conditions, but entirely failed so to do. The officers of the United States without any right took possession of those lands, entered into an agreement with your orator to submit the question concerning those lands, including the title, to arbitration. By that arbitration several plans which we have described, and which are shown on a sketch attached to this brief, for dams which would hold back the water, were set out and awarded. The award was returned to the proper officer of the United States, and the United States had the option, if anything was wrong in the arbitration, to bring suit in its own court, within six months after the return, to set it aside, yet the Government set up no objections, and brought no suit.

But the Government proceeded to build part of a dam on the land according to plan "fourth" of the award, which afforded for more than twenty years all the water that was required for the cities of Washington and GEORGETOWN, the Maryland channel only being used by that dam. XXIII. Finding of Fact (App. p. 15).

It will be seen that Congress passed the Act of May, 1853, to procure a supply of wholesome water for the "CITY OF WASHINGTON" only. No appropriation was made to take land and water to supply any other place but WASHINGTON. Maryland consented only to that supply being taken. The proceedings of inquisition asked for a verdict only for the amount of water for the CITY OF WASHINGTON. Congress passed no Act authorizing any water to be taken

from your Orator for the City of Georgetown. After the works were constructed, and without authority of law, either by appropriation or otherwise, the officers of the United States not only took water from Great Falls to supply the City of Washington, but also the City of Georgetown.

The agreement for arbitration recites that "the United States desired to use a portion of the waters of the Great Falls for the purposes authorized by Congress, *i e.*, Washington aqueduct (Rec., p. 4), and the party of the second part claimed to own certain lands in that locality, and with all the efforts heretofore made to adjust said claim had failed, after costs and loss of time on both sides. Now, therefore, with a view to a prompt, fair, and final settlement of this controversy, etc."

That Georgetown was not to be supplied would appear (Rec., p. 9) from the adjudication of the arbitration that the amount of water which, according to plan "Fourth," would be taken out of the river by the aqueduct would be only *two* per cent of the water of the river, as that is all that flows in the Maryland Channel. VII. Finding of Facts Appendix p. 5.

Yet, thereafterwards, and before any compensation was made, to wit, on March 3, 1859 (11 Stat. at Large, Ch. 84) the water of the Great Falls was given to Georgetown, and by the Act of 1862 Georgetown was authorized to tax her citizens in order to obtain it. Still, during all that time, no act of condemnation was made, or purchase had by the United States to obtain that water for Georgetown.

Thus it appears that the United States have been taking the water of the Great Falls to supply the City of Georgetown for all these years without any compensation therefor, or any Act of Congress authorizing it to be done, and have been receiving payment from the City of Georgetown for such water.

Lest this performance should not be at once appreciated by the Court, attention is invited to the Act of May 21, 1862, just cited, (see Appendix, p. 26) which, by the second section thereof, authorized the corporation of Georgetown, as well as Washington, to assess taxes on the individuals using the water, and to sell property for the payment of those taxes.

Attention is also called to the provisions of this statute by

which, in consideration of a supply of water, the City of Georgetown is to lay all the pipes except such as are necessary to supply the Government with water. And, by section three, Georgetown is allowed to borrow a sum not exceeding $50,000, and it is empowered to tax the citizens up to any expense necessary for keeping up to the said city a supply of water, which, of course, would be a means of paying the Government.

An increased water supply for Georgetown is now taken under the Act of July 15, 1882, for "taking water to supply the CITY OF WASHINGTON" and "other purposes," the taking for Georgetown being concealed under the words "other purposes."

While the Attorney-General and Secretary of War are continuing such appropriation of your Orator's water rights and to occupy his lands without law, can they not be restrained from so doing by injunction, and can they be permitted to do this without some means of its obtaining compensation are provided? Let it not be forgotten that the taking of water for Georgetown was nowhere provided for by any Act of Congress, the proceedings under the inquest, the proceedings under the submission to arbitration, or the award of the arbitrators, and that in the suit in the Court of Claims the Government defended against any payment of compensation adjudged by the award for the taking under plan "Fourth," that it never had acquired any title whatever to these lands or water.

That the dam under plan "Fourth" was unfinished until the Act of 1882, which appropriates money to complete said dam from point to point, thus building exactly the dam of plan A, of which plan "Fourth" was a part.

We have now furnished the history of the doings and omissions to do, of the Government officers before the Act of July 15, 1882.

PROCEEDINGS UNDER THE ACT OF JULY 15, 1882.

We now come to a statement of what was done, and omitted to be done by the Government and its officers in relation to the injuries sustained by your Orator because of their omissions and proceedings, under the Act of 1882, to increase the water supply of the City of Washington, and for other purposes. These are set out in the Record, marginal pages 12 to 18 inclusive, and complete our statement

of the case. All these facts well pleaded are admitted by the demurrer to be true.

The Secretary of War did not cause to be made a survey and map of the "lands necessary for a dam across the Potomac river at the Great Falls, including the land now occupied by the dam, and the land required for the extension of said dam across Conn's Island to the Virginia shore," sufficient with any degree of accuracy, as such survey should have been made, to be the foundation of passing the title to the land and water rights of the plaintiff necessary to be taken for the purposes of said act.

The Secretary of War and the Attorney-General of the United States did not proceed to "acquire to and for the United States the outstanding title to land and water rights of the plaintiff," which said rights and title, both the Secretary of War and the Attorney-General knew existed from information furnished them by your complainants, and which the plaintiff offered to sell to them, on the 15th day of January, 1883, and to convey to the United States all rights mentioned and awarded in the second paragraph of said award, hereinbefore set out as to dam A, provided plaintiff might build and maintain a canal and bulkhead across and upon the land of the United States on the Virginia shore of the Potomac, so as to use the water in the pool above the dam A, subject to the superior right of the United States to use the water in the aqueduct in the manner and to the extent shown by the specification of said dam A, and its corresponding operations, for forty-five thousand dollars, appropriated by Congress to purchase said water rights and land, provided the United States would build said bulkhead mentioned in said award and specification, and connect the same with the old canal, so that the plaintiff could use the water of said river not needed for the purposes of said act.

And your complainant is informed and believes, and therefore avers, that the difference between the $45,000, the consideration money for deeding said rights and land to the United States, and the sum of sixty-three thousand seven hundred and sixty-six dollars, awarded by the arbitrators for the use by the United States of said land and water rights required for said dam A, would have been more than sufficient to have made the changes proposed by your complainant in the dam which the United States are now building.

But the Attorney-General and Secretary of War never made any answer to plaintiff's proposition, except to inform it that it had no water rights whatever.

The proposed acquiring of water rights and land for the purposes of a dam, as the same is described in the published notice of the Attorney-General, on the 20th of August, 1883, is not other and different, but substantially the same as the dam A, the plan of which we submitted to arbitration, and by said arbitration compensation was awarded to plaintiff for the land and water rights taken and to be taken for the purpose, in the sum of $63,766.00, together with the right of the plaintiff to use the remainder of the water not taken under said plan by means of proper canal and bulkhead appliances, on the Virginia shore of the river.

The Secretary of War and the Attorney-General of the United States did not do the things requisite to enable said lands to be taken under said act, by the right of eminent domain.

I. They did not "proceed to acquire, to and for the United States, the outstanding title to said lands and water rights" of plaintiff.

II. They resorted to condemnation of said lands and water rights when it was not necessary so to do, and without notifying or calling on plaintiff to consent to the acquiring said lands and water rights to and for the United States.

III. The Attorney-General did not proceed, before condemnation was attempted, to ascertain the owners or claimants of said lands of plaintiff.

IV. No survey or description of the water rights attempted to be condemned was made or published, or inserted in any newspaper, as a proceeding precedent to said condemnation, nor was any determination arrived at by said Attorney-General, or by any other person, as to the amount of said water rights or water in said river which was to be condemned, nor did he give notice as to how much water was to be so taken by condemnation, whether a part or the whole of said river, so that the appraisers of the value thereof, provided for by said act, could not appraise the water to be taken. On the contrary, the only claim made by said Attorney-General as to said land and water rights, or notified to your complainant, by pub-

lication or otherwise, was contained in a newspaper publication, in the words and figures following: —

"In addition to acquiring to and for the U.S. (*sic*) any outstanding title to these lands at the Great Falls, it is also proposed to acquire all water rights implied in the possession of the same, or needed for purposes contemplated by the act under which these proceedings are taken."

"The map of the surveys (in three tracings) required for the uses enumerated in the above-named Act of 1882, Chap. 294, may be seen at this Department by all claimants to any portion of said premises."

The Attorney-General applied to the Chief Justice of the District of Columbia for the appointment of three persons to act as appraisers, as provided in said act; but did not give them any description of any tract of land, the ownership of which is claimed severally or otherwise, belong to the plaintiff, that said appraisers might fairly and justly value the same, or any water rights, or intimation of water to be taken, nor did said appraisers value either land or water rights belonging to the plaintiff, nor has any amount been tendered to your complainant therefor.

The Secretary of War, in the year 1883, by his servants and agents, wrongfully took possession of the lands of the plaintiff, claiming to have done so in behalf of the United States, in the State of Maryland and in Virginia, which land was not within any description made, surveyed, or traced by the Secretary of War, and has used said land for the purpose of constructing a dam along a portion of said land across Conn's Island, and over said river to the Virginia shore, and has built a large portion of said dam by means of his said servants and agents, without making any bulkhead in said dam, or any provision whatever by which your complainant can use any portion of the water for manufacturing or other valuable purposes, as was awarded by the arbitrators in their award as aforesaid, in favor of the plaintiff, the dam to be constructed after the manner of plan A. The War Department of the United States has occupied said land with a force sufficient to prevent any opposition on the part of the plaintiff to its acts and doings, or the acts and doings of its servants, agents, and employés, without a breach of the peace of the State of Maryland.

There has been established at Washington a bench mark near the foundation of the Capitol, showing its height above mean tide at Washington, which bench mark has been used as the standard for all engineering purposes in and about the District of Columbia, wherein reference is made to tide. And when Congress appropriated money "for work and material to complete the dam at Great Falls to the level of 148 feet above tide, and extend the same to the Virginia shore, one hundred and forty-five thousand one hundred and fifty-one dollars," the words "to the level of 148 feet above tide," had reference, were equivalent to and not different from, an enactment that the dam was to be at a level of 148 feet above said mean tide shown by said bench mark, and no higher; but the United States are building said dam to a greater height, whereby large portions of the plaintiff's lands will be entirely covered with water, without any sanction of law or right whatever.

Your Orator has always stood for the award and insisted upon its validity, and claimed that the United States, being now completing one of the dams set out in the award from the Maryland shore across Conn's Island to the Virginia shore, should pay the amount of compensation fixed by the award, and should be decreed by Court to so complete that dam that it shall give the right to the surplus water, or, as the award expresses it, "the water subject to the superior right of the United States," to your Orator.

It may be said that, there being four plans found by the arbitration, and the United States having accepted one, and being compelled to pay for it, there is the end of the award. The answer to this is very plain and conclusive: Looking at the sketch of dams, it will be seen that plan Fourth, the plan of the dam from the Maryland shore to Conn's Island, near the centre, was, in fact, but a part of plan A, so far as it went, and was sufficient to supply water for the uses of Georgetown and Washington up to the year 1882, at the height of 148 feet above mean tide, as is found in the award as to said plan. XVIII. Finding of Fact (App. p. 14). But now it becomes necessary to have more water, and Congress, by the Act of July 15, 1882, appropriated $145,151.00 for work and material to complete the dam at Great Falls to the level of 148 feet above tide, which, the bill alleges, is a well-known "bench-mark," and extended the same to the Virginia shore. This appropriation,

therefore, is simply for the completion and extension of said dam according to Plan "A" of the award, — nothing more. This is also shown by the award of compensation for Dam "A" to the Company, $63,766. $15,692 was the award of compensation for Plan "Fourth," which, as we have seen, is only part of Plan "A." The Act fixes for land and water damages to be paid the Company for its extension in 1882, $45,000, which, added to the $15,692 already paid under judgment of this Court for Plan "Fourth," would be (not including interest), in effect, the award of the abitrators for Dam "A," to wit, $63,766.

Our contention, therefore, is, that the award which established Plan "A," having been, by judgment of the Court of Claims, held to be a valid one, and that judgment being sustained by the Supreme Court, the United States is bound by it, and the fact alleged in the bill, that Dam "A" is the one now building by the United States, having taken possession of the land for that purpose; that the United States having made no compensation for so doing, nor made provision for any, which facts are alleged in the bill and admitted, the defendants are *trespassers ab initio*, and the bill should be sustained, and the defendants restrained from further proceeding until the United States make compensation, which was awarded against them.

We further contend, that under the facts admitted, the United States cannot exercise the power of eminent domain over this land in the manner it is attempted to be done by the Act of July 15, 1882. (See Act, Appendix, p. 1.)

We admit that the United States, as a government, have an inherent right to take property anywhere within its boundaries in any manner, with or without an Act of Congress, for certain public purposes, where the urgent necessities of the Government compel such takings.

For example, war raging, it may build a fort, barricade a river, seize a railroad, without any Act of Congress or provision for compensation.

Necessity compels.

In time of peace we hold the law to be, that the United States cannot take and occupy certain kinds of such private property of the citizen in a State except for such incidental use as may arise from making surveys, rescuing the lives and property of its citizens through its officers from imminent peril, as in the case of the use of private lands by the Coast Survey and Life-Saving stations, without a preceding Act of Congress which shall define a constitutional mode o taking such property, and provide means by which the owner can obtain compensation and a proper tribunal for the assessment of the amount of such compensation, to which the injured party may by his own act as of right at once resort, and from whence the citizen shall certainly receive such compensation.

We do not involve in this discussion the question whether when the Government takes property it is obliged to provide a fund to answer the claim of a citizen for the property so taken before the United States can occupy it, because we believe the law to be that the United States being deemed solvent by him whenever the compensation is to be ascertained, and the provision made by law for its certain payment, it is to be presumed the same will be paid.

But we do claim, that as the United States cannot be sued, and may for a reasonable time occupy property taken and not compensated for, because of this presumption, makes it most imperative that a speedy mode of assessment of damages should be provided for; that that assessment should be within the present reach of the injured party without let or hinderance, in case the Government take possession of landed property, it should make full appropriation of it, as it may take possession of the property before payment is actually made, as is not the case where some corporations, municipal and other, may be empowered to take private land for public use by an Act of the Legislature. Specially is it the duty of the Government to do, and the right of the citizen to have this done, when lands are taken into the hands of the Government where there is no rule of damages for delay and interest on the price of the land, as in case of personal property affords no adequate compensation for the delay, as the citizen is wholly powerless to compel any action of the Government in his behalf; so that if, either by the terms of the Act by which private property is taken, any undue delay is interposed to the payment, or

such delay is caused by the acts, neglects, or omissions of officers to whom the execution of the taking is committed, then the occupation and appropriation of the property without payment becomes unlawful by the Government and against the right of the citizen.

That of necessity this should be the law is completely exemplified in the present case.

True, it is to be presumed that the Government will not nterpose needless delay, and that the Government will always act justly and properly towards the citizen, but that presumption in this case is shown to be most signally untrue. The Government of the United States took the land of this Company for the purpose of an aqueduct to supply Washington, and did supply Georgetown with pure water in 1859, the aqueduct being opened before the dam was needed (Rep., p. 3); and with every effort, as has been shown, for more than a quarter of a century, this company found it impossible to get a single dollar of compensation. This was not owing to its want of diligence, for it was instant in season and out of season in that behalf, but because of the interposed delays of the Government officers. And at last it was gravely argued by the Solicitor General of the United States, before the Court, in the case of the Company against the United States (112 U.S. *ubi supra*), that the acts of Government officers in taking these lands and water of your orator, were not acts of the Government at all, but simply trespasses of the Government officers, by which the Government acquired no right and incurred no liabilities, and so had the use of our land and water for two decades, and for the same time we got no compensation, and never compensation for the water Government diverted to Georgetown.

Therefore, we have brought this, our bill of complaint, to have determined what the character of this present occupation of our land may be, if possible, before twenty years shall have elapsed and this generation is dead.

Our land has now been occupied and water taken five years, and we have not been able to be heard yet before the Courts of the United States on that question of compensation; and this Court felt it its duty to deny our motion for advancement of this case of claim to have such trespasses enjoined, so another generation may pass before we can get just compensation from the presumed justice of

the Government. The Sovereign, a Monarch, can do no wrong, and therefore is always just; but there is no such presumption in regard to this Government. See Langford *v.* United States, U.S. R., p. 341, where the Court held, that when the officers of the United States take property they are presumed to be trespassers. If there were any presumption of right done, it would be, as our case shows, of about as much practical benefit to the citizen as the old maxim "that the husband rules the wife."

Should not the rule be, therefore, nay, is, that when the United States takes property in time of peace, with which to supply one city with water and supplies two cities (which right is nowhere contemplated in the Constitution, so far as I have read that instrument), that proper and sure provision should be made for compensation, to be paid before the water is actually so taken and used?

It is but just to say, however, that it would seem as if the Act of 1882 intended this to be done, and contained provisions for an appropriation by which it could and ought to have been done; but the officers in charge gravely tell us that they simply have not done anything in regard to the compensation for lands so taken the law required them to do, but have neglected their plain duty for more than five years, the only excuse being thus stated in an official report: "*As questions of law were involved, it was deemed impossible, without the examination of numerous witnesses, to arrive at the value of the land to be taken, exclusive of the injuries to be wrought by the taking upon the other property, and the rights of the claimant.*" (Rec., p. 30, Report of Brewster to Senate.) That is to say, the Act which authorized the taking directed the Attorney-General to have the injury so done appraised at once by appraisers whom he could call out, and the amount found to be tendered to the Company. (Rec., p. 10.) This he refused to do, because it required examinations of law and witnesses as to the value, and the party had another remedy in the Court of Claims. The injured party was given by the law the speedier remedy by appraisement and tender. Why should this officer deprive him of that?

A case in the Court of Claims finished, averages, if important, more than six years. Ours lasted sixteen years. Besides, all damages having been awarded by the arbitrators; why not tender that sum?

It will be observed, in the same clause of the Attorney-General's report, he says that the claim of the Great Falls Company was not presented until October, 1884, to the Attorney-General. That simply is not the fact, for it appears (Rec., p. 12) in the averments of the bill: —

"And your orator offered to sell said land and water rights to the United States, at a fair valuation, by appraisers to be appointed mutually between the parties, which said offer was communicated to the Attorney-General of the United States by the President of the Great Falls Manufacturing Company, soon after the passage of said Act of July 15, 1882."

"And your Orator is informed and believes, and therefore avers, that upon said offer not being accepted by the Attorney-General and Secretary of War, on the fifteenth day of January, 1883, said company offered to convey to the United States all rights mentioned and awarded in the second paragraph or award, hereinbefore set out as to dam A (Rec. p. 12).

Besides, in the very Act of July 15, 1882, the taking of these lands and water rights of your Orator are in a manner provided for by name and description, so that it was the duty of the Attorney-General to take notice of that claim on his own account, and proceed to adjust it. The injured party was neither allowed to appoint an appraiser or appear before the Board.

What will this Court say to the proposition that the injured party, when his property has been taken, is to be left for his remedy to a supposed appeal to the justice of an officer who will deliberately state that the Great Falls Company's claim was received on Oct. 9, 1884, when in the same communication he declares that he decided he was *functus officio* as to it in August, 1883? Besides, it is stated in the bill, and admitted, that negotiations as to these very claims were going on from the 1st of January, 1885, between the Company and the Attorney-General of the United States and Secretary of War, wherein the Company had offered to take what had been awarded twenty years before as its just damages to be paid by the United States for the same dam and water right with a good title.

One of the grounds set forth in the opinion of the learned judges refusing the injunction asked for in this bill was, that it was brought eighteen months after this work commenced on the Company's land,

while your Orator had been besieging the doors of the officers having this matter in charge for remedy; yet, relying apparently upon this statement that our claim was delayed in filing till Oct. 9, 1884, the injunction was denied because of *imputed laches*.

If we have stated correctly the provisions of law when the United States takes possession, in time of peace, of private property, when no special exigency exists, then we say that the provisions of this Act of July 15, 1882, do not comply with the provisions of the Constitution of the United States.

First: It does not concern a matter wherein, by the terms of the Constitution, Congress has any right in time of peace to condemn land.

Congress is empowered by the First Article of the Constitution, Section 8, Clause 17, to exercise its (like) "authority over all places purchased by the consent of the Legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dock-yards, and all other needful buildings."

We claim that this grant of power is an inhibition of all power of obtaining property for like purposes, except always in the case of prompt necessity or emergency; and Congress has never yet exercised the power to take any property for like purposes except by purchase, with the consent of the State.

If the Court should decide that it had such power, where does the Government get a territorial jurisdiction over land taken without the consent of the State?

FOR THE WHOLE NATIONAL LIFE SUCH POWER HAS NEVER BEFORE BEEN EXERCISED.

In what book on constitutional law has this clause of the Constitution been developed or intelligently commented upon? In what volume of reports has it been decided to exist, when the case showed that the State refused assent? *Not in Kohl* v. *U.S.*, *ubi supra*. There it is said, condemnation may include purchase. That may be true; but does purchase include condemnation without the consent

of the State? Kohl's case ought not, and does not, decide this question, because the land was taken with consent of the State, which ceded jurisdiction over it. Therefore the question did not arise, and all that is said on that subject is *obiter dicta*.

One would conclude that such claim of power was never made by Congress, because by joint resolution of 1841, *ubi supra*, no officer is allowed "to do any work or expend any money on any land in any State until the Attorney-General has certified the title thereto?" Such certificate would be necessary in case of a purchase; but wholly unnecessary in case of condemnation, because whenever the United States, in due form of constitutional law, condemns land for public use, the title passes to the United States as against the world without further interference of the Attorney-General or anybody else. No question of title can in such case arise.

The provision of the Constitution requiring assent of the State not only has been, as I say, strictly followed, and no land ever taken in a State by direct condemnation, without assent of a State, so far as is shown by any judicial decision or controversy; and this course has not been without design on the part of Congress, but *ex industria*, as is seen, by the policy announced by Congress in 1841.

Congress, in the act authorizing the building of an aqueduct to supply the City of Washington, made it a condition precedent that Government should have the assent of Maryland to acquire any of her lands by purchase, and Maryland assented that her lands might be so taken, provided the compensation should be assessed by a jury, as we have seen, — a condition that never has been fulfilled, although these very lands have been taken and occupied by the United States which still retains the ceded jurisdiction over them.

In the Act of July 15, 1882, there is neither provision for the assent of Maryland or for a jury, nor is it even intimated in that act that these lands taken from this Company are in the State of Maryland.

Upon these facts, thus apparent upon the record, we assign for error in the decisions, orders, decrees, and refusals to decide order

and decree of the Court below, the following errors in matters of law.

The Circuit Court ought to have decided and decreed: —

I.

That said Act of 1882 in its provisions is unconstitutional: —

1. In that it does not take private property for public use.

Instead thereof it takes land and water-power, the property of the United States under the award, but for which the Government has not paid compensation to the owner.

2. In that the Act tends to avoid an adjudication and determination of damages for land already taken by the United States by a new taking.

3. In that the Act tends to avoid and set aside a compact with a sovereign State for the making of which the Government has received consideration from the State and its citizens, to which the faith of the Government is solemnly pledged.

4. In that it takes private land and water privileges in that State without the assent of the State of Maryland, or any cession of jurisdiction thereof, for the use of the inhabitants of Washington and Georgetown.

II.

In that it does not provide for a constitutional and impartial tribunal to assess and determine the damages or compensation for the private property taken, if the taking is a "purchase" or condemnation in these: —

1. It provides for a valuation of lands and water-rights taken, for purpose of fixing just compensation for the taking by appraisers, all appointed by an agent of the Government only, and does not provide any notice to the injured party to take part in such appointment, or to be present, or heard at the appraisement. And the only provision for compensation is a tender of such valuation, and to get that, a deed of its land must be executed at his own expense by the injured party.

2. It provides that such appraisers shall not consider the true and just value of the property taken or injured as compensation, in these words: "In making the valuation the appraiser shall only

consider the present value of the land without reference to the value for the uses for which it is taken, under the provisions of this Act."

3. It does not provide for a constitutional tribunal by which damages and compensation shall be assessed for private lands taken for a public use, such controversy being a "suit at law;" the trial by jury was not provided, nor any tribunal whose judgment as to compensation can be enforced; nor is any pledge of the faith of the Government that said compensation shall be paid, or any payment ordered, save in case such appraisement is accepted.

4. In this that it provides as the only tribunal, the Court of Claims, which has no power to enforce the payment of any of its decisions, or to adjudicate cases of suits like the present, where specific performance of contracts is to be adjudged and enforced.

5. In that the Act does not provide, nor is there any other provision of law by which the compensation for the property taken shall be paid, or any fund from which it shall be paid, save such as may hereafter be voted by the Legislature, and approved by the accounting officers of the Treasury.

III.

The Circuit Court erred in this: Assuming the provisions of the Act to be within the purview of the Constitution, and the manner of taking as described by the Act is not in any of its parts constitutionally objectionable, the Court should have overruled the demurrer, and granted the relief sought for by the bill by some proper order and decree in favor of your Orator: —

1. Because it was the duty of those charged with the execution of the Act to carry out and enforce every provision thereof in relation to purchasing and to "acquiring said land and water-rights," and providing for valuation and appraisement thereof, and so to do all things that your Orator might get relief in the premises without any delay except that of urgent necessity. As to all and each of which duties, doings, and things to be done, prescribed by said Act relative to your orator or his said lands, said officers or either of them did nothing.

2. Because that the Secretary of War and his officers and agents became trespassers *ab initio*, by entering upon the lands of your complainant and taking possession of them. By the provisions

of said Act, "upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map, and proceed with the constructions herein authorized; and upon payment being made therefor, or without payment upon the expiration of the time above limited, without the filing of a petition, an absolute title shall vest in the United States;" and no surveys or proper map embracing the lands had been made by him, as is charged in the bill, and as is admitted by the demurrer; nor was any provision for payment made; and, without payment or provision for payment, Congress cannot vest an absolute title to the lands of the citizen in the United States.

3. Because, if the officers charged with the execution of this Act, do on the land anything not authorized and directed by the Act, or take any other and different, or more property, or for any other purpose than they are permitted by the Act, then such officers become trespassers *ab initio*, and should be enjoined, and other relief against them be afforded.

ARGUMENT OF ERRORS ASSIGNED.

We will now present to the Court such considerations of the law and fact to sustain these several assignments of error as may seem to be relevant and proper.

The four points raised under the first error assigned are as follows: —

I.

That said Act of 1882 in its provision is unconstitutional: —

1. In that it does not take private property for a public use.

Instead thereof it takes land and water-power, the property of the United States under the award, but for which the Government has not paid compensation to the owner.

2. In that the Act seeks to avoid an adjudication and determination of damages for land already taken by the United States by a new taking.

3. In that the Act tends to avoid and set aside a compact with a sovereign State, for the making of which the Government has

received consideration from the State and its citizens, to which the faith of the Government is solemnly pledged.

4. In that it takes private land and water privileges in that State, without the assent of the State of Maryland, or any cession of jurisdiction thereof, for the use of the inhabitants of Washington and Georgetown.

These may as well be argued together, as the considerations applicable to each are blended with the others.

The question whether it is within the power of Congress to take private property under the circumstances and for the uses for which the property of the Orator was taken, by an Act of eminent domain, to furnish the City of Washington with "wholesome water," that is, water for domestic purposes (see Act of 1853), has never yet been decided by this Court, or any other Court, so far as we are instructed.

We do not deny that Parliament may take any water in the United Kingdom for a supply for the city of London, and its adjudication of the judicial question whether that is a public use would be conclusive. Or that the Legislature of New York may by act take any water within its jurisdiction to supply its chief city. Or that the State of Pennsylvania may take the waters of the Schuylkill river to supply the citizens of Philadelphia; and those acts would be like adjudications. But that is because upon this matter the representative of the sovereign power of the people, the Parliament, is omnipotent; and so are the Legislatures of the States, expressing their will in the care of their citizens. And each State might take all the waters within its boundaries and appropriate them for the use of all the citizens of the State; but we deny that any State can take the water from the citizens of another State, however large or extensive that public use might be; and the reason for that inhibition is not because the States are not sovereign in that regard, but because they cannot interfere with another sovereignty. Now, the Government of the United States is not sovereign except where it is made so by the Constitution. It has certain powers which have been conferred upon its Congress by the Constitution, but those not specifically so given, are reserved to the States or the people by Article X. of the Amendments; and the United States is not sovereign in its capacity save to carry out those powers delegated to it by the

Constitution. Therefore, in cases of necessity to preserve the nation's life, it may exercise as high sovereign powers as any government; but in relation to the matter in hand it has only the powers expressly delegated to it by the Constitution, Article I, Section 8. Nowhere else has any such powers been given to Congress. Congress may exercise exclusive legislation in all cases whatsoever over such District, not exceeding ten miles square, which may, by the cession of the particular States, and the acceptance by Congress, become the seat of Government of the United States. Any exercise of power by Congress under that section must be only within the District: "That is, in all cases whatsoever where authority so to do has been ceded by the particular States." Where, by this clause of that section, is there any power given to Congress to exercise any jurisdiction outside of the District for the benefit of the people of the District as against any State?

And again, where the Legislature of a State will consent, Congress may exercise like authority over that part of a State for which consent is given, but for certain enumerated purposes only, to wit: building dock-yards, etc., and other needful buildings. But this must be done only after "purchase of the place," *with the consent of the Legislature of the State.* Nor has Congress ever attempted to exercise this power without the consent of the State; that is, the power to take possession of land in a State without an immediate and overpowering necessity therefor.

We need not discuss this further, because in this case Congress limited itself to that power of purchase in its first act of appropriation for taking this water. (Act of March 3, 1853, Appendix, p. 6.) Maryland consented, but only *sub modo*, that it might be purchased upon certain terms of indemnity to her citizens, and not otherwise, among which was one making it lawful for the United States only to enter upon lands, and take and use materials (where its agents could not agree with the owners for a purchase of the land), "after having made payment, or tendered payment for the same at the valuation assessed thereon, in the manner hereinafter prescribed." (See Section 2, Act of Maryland.) And for more than thirty years Congress has not asked Maryland to grant her consent upon other terms to purchase this land and this water for this purpose, but has asked leave of the State of Virginia to purchase land on the opposite side

of the river, at Great Falls, for the same purpose. (See Act of Virginia, Appendix, p. 30.)

I certainly shall not stop to argue the proposition that Congress, by this second Act for taking water, meant to change the relations between the United States and Maryland from what they were at the time of the first purchase, and still continue otherwise to be, and take its lands as against Maryland, because I cannot conceive of such an act being wittingly done by Congress. The Act is only to increase the water supply of Washington. That is, Maryland having agreed to the taking of a water *supply* by the United States for Washington, Congress now proposes to increase that supply. How? Of course, in the same manner in which Maryland consented that it should be purchased.

Therefore, the question arises, What is this taking? If by purchase by the Act of 1853, then, if "purchase" includes condemnation, that condemnation must be *sub modo*.

There is another branch of these assignments of error, to which we desire the careful attention of the Court: The United States, by its officers, called upon Maryland to afford the proper jurisdiction to the United States, and the proper means by which she could possess herself of certain land and water-rights for the construction of an aqueduct at Great Falls. Maryland, as we have seen, so agreed to do, under certain provisions. Those provisions were accepted by the United States, and the Attorney-General sued out process before the Courts of Maryland as an initiatory step to purchasing the water, by first ascertaining what was to be paid for it. A jury was called and returned a verdict. That verdict was set aside on the motion of the United States. The United States, in the meantime, as it could not do under the laws of Maryland, entered upon and took possession of the premises for the purposes for which the consent of Maryland was asked. Afterwards an arbitration was entered into, which has been sufficiently described, and the whole proceedings in regard to it are extended in (Appendix, pp. 7–13), the result of which was an award of the arbitrators, which was never set aside, although the submission made a provision for that action, that a certain plan of building a dam, known as "Plan A," might be followed by the United States, and the water which it would retain be used for the purposes of an aqueduct upon the payment of

a certain sum, and doing the acts set forth in the award. But "Plan Fourth" was only a part of "Plan A"; that is, providing a dam of a certain height across the Maryland channel. The Department of the Interior refused to stand by or pay the award. The officers of the United States, without further authorization by Congress, began work upon a dam from the Maryland channel to Conn's Island, which the Court of Claims and the Supreme Court have found to be a substantial equivalent for one part of the dam, according to "Plan A." No more water was required than "Plan Fourth" would have given the United States. Afterwards, the Company, which had always accepted and stood by the award, petitioned for payment for the amount of water and land taken, which petition was decided by the Court of Claims in their favor, and the amount awarded by the referees, without interest, was paid them by a decision of this Court.

Now, we claim that the action of the officers of the United States in taking possession of the land of the Company, Conn's Island, and building the dam across it, took possession of the land and water of the Company, and have used them for the benefit of the United States from that time until the present, and such action has been assumed by the Courts to be the action of the United States agreeing to that plan of taking water according to the award, and thus, as your Orator claims, have become possessed of the land and water-rights and water-power which would have come to the Government under "Plan A," under the award, except that it has not paid for it. When Congress enacts that dam "A" shall be completed, it has only enacted that it will accept the award; or, in other words, authorize the completion of the dam which it had purchased the right to do before, by the award and agreement thereto of the Company. In other words, the award gave the United States the option to build a dam according to "Plan A" whenever it chose, for the purpose of supplying Washington with water. The Orator accepted the award. The United States, by its officers, without further authority, built a dam substantially the same as "Plan Fourth," which was a part of dam "A," across the Maryland channel. The dam did not interfere with the flow of the remainder of the water in the river, or its height, and, therefore, the Government had only occasion to pay for the water it had taken, and for the land necessary

to take that water, *i.e.*, the Maryland channel. The Company, accepting that condition of things, brought its suit in the Court of Claims for the amount found by the award for taking so much of its land and water. The Court of Claims sustained that, and gave judgment in favor of the Company, and that judgment was appealed from to the Supreme Court. The Supreme Court, by its decision ignoring the claim of the United States that it had not acquired any rights there, and that its acts were wholly trespasses, confirmed the decision of the Court of Claims. It is a remarkable fact, in this connection, that as soon as the Court of Claims decided in 1881 that the plaintiff had claims, and was entitled to compensation for the taking of the water, by a part of dam "A," Congress passed the Act of the 15th of July, in fact accepting the award as to dam "A," by ordering a completion of the dam according thereto. This fact of the dam to be completed being identical with "Plan A" is averred in the plaintiff's bill, and is not denied. Indeed, the words of the Act, to complete the dam at Great Falls to the level of one hundred and forty-eight feet above tide, and to extend the same to the Virginia shore, make clear reference to the award and the judgment of the Courts.

Has Congress by the Act of 1882 done anything more than complete the purchase of the land in Maryland by agreement of parties? The parties at first disagreed. A jury was invoked to settle the disagreement. That was found inoperative. The parties thereupon came together and agreed to submit their disagreements to certain other persons, and they awarded, and the parties have both acted under their award, the United States taking possession of the land and building the dam according to the award, and the Company calling upon the Government to be paid according to the award as far as it had gone, and has been so paid. The award gave the Government the right to extend the dam across the river upon further payment of a given sum, and the Government has authorized the extension of such dam, and is now completing it, and nothing remains for it to do but to carry out the award. Are we not right in our position, that instead of this Act being a taking of the land and water belonging to a private party, it is only an Act appropriating money to utilize land and water which belong to the United States when they pay for it, what they are doing, having

been adjudicated to be done by a tribunal chosen by the United States.

Doubt was raised whether the United States, where there is a controversy to be adjusted, can, through its proper officers, the heads of departments, submit that question to a reference. That is not an open question, since the case of the United States *vs.* Farragut, 22 Wall., 406, where the question how much money the United States could pay for certain vessels that they had taken and used that had been captured as prize by Farragut's fleet was to be determined, a reference was made, and the judgment of that reference sustained by the decision of this Court.

It has been said that a claim against the United States cannot be submitted to any tribunal except a court of the United States. We hope the Court will so decide, because we have a claim now against the United States which we want to have submitted to a proper judicial court of the United States, and nobody else. But at the time this reference was made there was no claim against the United States. The United States wanted some water. It called upon us to furnish the means of getting it. We failed to agree as to the price, and it was agreed to submit that price to arbitration. We had no claim against the United States until after the arbitration, and an award was made.

Is not the United States to be estopped by these proceedings?

The Act of Congress of March, 1853, and the Act of Maryland of May 3, 1853, having been accepted and acted on, the one by Maryland and the other by the United States, and the latter having received to its own use certain property and jurisdictional rights, without giving any consideration therefor, said Acts became a binding compact between the United States and Maryland, especially binding the United States to the faithful fulfilment of each and every condition annexed to the Maryland grant made for the benefit and protection not only of Maryland, but also of all property-rights affected, or to be affected, which theretofore had been held under the protection of Maryland law; and especially because the United States had on its own motion in the Maryland courts obtained a decree against the plaintiff declaring the existence of said compact and its validity, thus the United States and all its agents were forever estopped from denying the same as to the plaintiff in any pro-

ceeding relating to the taking at any time, past, present, or future, any of its lands and water rights in the State of Maryland, for the purpose of supplying the City of Washington with water from any source in said State.

This matter was determined in the case of the United States *vs.* Great Falls Company 21 Maryland, 119.

The Great Falls Manufacturing Company had applied to the Maryland State Land Office to purchase a certain tract of land at or near the Great Falls, as land belonging to the State, and had paid the State the full amount of purchase-money required by law therefor, and had done each and every other thing necessary to entitle it to a patent therefor. Whereupon, the United States filed a caveat against the issuing of said patent to this plaintiff, and carried the matter into the Maryland courts, alleging that the United States had a prior right thereto by virtue of said Act of Maryland of the 3d of May, 1853, passed at the instance and request and for the benefit of the United States. After a full hearing, final decree was entered against the Great Falls Co., the Court declaring that the two Acts above referred to constituted a compact between the United States and the State of Maryland, by which the United States acquired the prior right to the land in question.

The same doctrine had been held about the same land in Bedell *v.* U.S., 14 Maryland R., p. .

The United States, having accepted as a gratuity from the State of Maryland certain jurisdictional and property rights, under and by virtue of said Act of May 3, 1853, is forever estopped from the exercise of its own right of eminent domain as to any and all of the land and water rights within the scope of said Act of May 3, 1853.

The United States obtained through the Maryland Act what it could not obtain by right of eminent domain, to wit: jurisdiction, and this jurisdiction the United States has exercised. As Maryland could attach her own conditions to this gift of jurisdiction, the same are perpetual and binding on the United States, not only as to Maryland, but also as to all the citizens of Maryland, for whom she exacted said conditions. The jurisdiction given could not extend beyond the taking. As every new taking carried with it a new extension of jurisdiction in the United States, it is evident that the last taking, for

extending the dam, depends on the Maryland Act for its validity as much as the first act of taking, and the conditions imposed must be complied with. And further, until some Court can be found to say that the Government is not as much bound by its contracts as is one of its citizens, our contention must be held to be good law, and the plaintiff can take advantage of the condition, for the State made it for its benefit.

Under the provision of the second section of said Act of May 3, 1853, the United States could not acquire the right to *enter* upon plaintiff's land, save under an agreement of purchase or condemnation, under Maryland laws, and payment, or tender of payment, the bill alleging and the demurrer admitting that the United States had ignored its contract of purchase, and had neither paid, nor tendered payment, for the plaintiff's lands entered upon by defendants.

Can it be held by the Court that said compact, agreement of submission, submission, award, as to Plan "A," the adoption by Congress of said plan, and the appropriation of money for the carrying out of said plan, all combined, do not constitute a valid contract of purchase, then neither the United States nor its agents had any right of entry on plaintiff's lands, not having acquired that right by the only other mode prescribed by said Maryland Act?

ARGUMENT ON SECOND ASSIGNMENT OF ERRORS.

II.

"In that it does not provide for a constitutional and impartial tribunal to assess and determine the damages or compensation for the private property taken, if the taking is a purchase or condemnation in these:—

"1. It provides for a valuation of lands and water-rights taken, for purpose of fixing just compensation for the taking by appraisers, all appointed by an agent of the Government only, and does not provide any notice to the injured party to take part in such appointment, or to be present or heard at the appraisements. And the only provision for compensation is a tender of such valuation, and to get that, a deed of its land must be executed at his own expense by the injured party.

"2. It provides that such appraisers shall not consider the true and just value of the property taken or injured, as compensation, in these words: "In making the valuation, the appraiser shall only consider the present value of the land, without reference to the value for the uses for which it is taken, under the provisions of this Act."

3. It does not provide for a constitutional tribunal by which damages and compensation shall be assessed for private lands taken for a public use, such controversy being a "suit at law," the trial by jury was not provided, nor any tribunal whose judgment as to compensation can be enforced; nor is any pledge of the faith of the Government that said compensation shall be paid, or any payment ordered, save in case such appraisement is accepted.

4. In this, that it provides as the only tribunal, the Court of Claims, which has no power to enforce the payment of any of its decisions. or to adjudicate cases or suits like the present, where specific performances of contracts is to be adjudged and enforced.

5. In that the Act does not provide, nor is there any other provision of law by which the compensation for the property taken shall be paid, or any fund from which it shall be paid, save such as may hereafter be voted by the Legislature, and approved by the accounting officers of the Treasury.

The Act, in fact, gives no way in which damages can either be agreed upon or assessed, which requires or permits any act to be done by the injured party to obtain his damages, except to file a petition in the Court of Claims. It provides for a valuation by appraisers, neither of which shall be appointed by the injured party; but he shall not be heard before such appraisers, nor point out even what his land is, or what the title to it is, or where it is situated. He has exactly and precisely nothing to do with the appraisers or with the appraisal.

The whole theory of the law of appraisement is that there shall be some representative of both parties on the Board. Whenever an officer of the law sells, or sets off land where appraisement is required, one appraiser is always to be appointed by the party to

be affected thereby. When one party appoints all the appraisers, that very fact makes those appraisers a partial Board.

Rhine *v.* City of McKinney, 53 Texas, 362–363.

The Court declares: —

"In any event, it would not seem to be a fair and impartial "mode to have the appointment made *ex parte* by the corporation "to be benefited, and in which appointment the owner of the "property taken — and for the loss of which the Constitution "guarantees just compensation — has no voice, and particularly "where there is no remedy given, by appeal or otherwise, to have "the award of the commissioners reviewed.

"Although the interest of the individual members of the corpor- "ation might be so remote as not to disqualify them to act when "properly appointed, yet their selections should be made by such "mode as would reasonably be fair and impartial alike to both "parties. Neither alone should have this exclusive right.

"Those provisions in the Constitution which relate more directly "to the protection of the inalienable rights of life, liberty, and "property, should be upheld with a strong hand, and, although we "in any case reluctantly declare an Act of the Legislature unconsti- "tutional, yet, as the courts are the last resort for the legal "protection of the just rights of the citizen, and as we believe that "the section of the statute under consideration does not afford that "protection, we feel constrained to declare it unconstitutional.

"Judgment reversed and cause remanded."

And, substantially, the same strict rule is applied when the State itself seeks to appropriate private property; for it is not unreasonable that the property-owner should have the right to insist that the State, which selects the occasion, and prescribes the conditions for the appropriation of his property, should confine its action strictly within the limits which it has marked out as sufficient. So high a prerogative as that of divesting one's estate against his will should only be exercised where the plain letter of the law permits it, and under a careful observation of the formalities prescribed for the owner's protection.

Cooley Con. Limit., 656.

But in regard to this appraisement a more vital question is touched: The Act provides that the appraisers shall not consider the true and just value of the property taken or injured as compensation, in these words: —

"In making this valuation, the appraisers shall only consider the present value of the land, without reference to its value for the uses for which it is taken under the provisions of this Act."

Upon this question our contention expresses itself in this, that an Act of eminent domain can never put any legislative condemnation upon the value of the property taken, or the injury done by the taking. What shall make up that value is a judicial question, and the Courts give the advantages of both the present and future use of the property taken as elements of its value, and of loss to the party.

The question has been very fully determined in the highest tribunal in England, and the general rule is thus stated: —

"Here it is now settled that all subsequent or recurring damages may be assessed, and only recovered in a suit brought upon the original cause of action. The same rule applies to persons where a person is authorized to do an act which will injuriously affect another, upon paying compensation.

Great Laxey Mining Co. *v.* Clague, 4 App. Cas., 115.

The rule again is settled, that when a prospective loss may be the subject of a fresh action when it occurs, it cannot be allowed for beforehand, and *vice versa*.

Nicklin *v.* Williams, 10 Ex., 259; affirmed in this respect per Lord Westbury, 9 H. L. C., 512; per Willes, J. E. B. & E., 658; Hamer *v.* Knowles, 6 H. & N., 454; Lamb *v.* Walker, 3 Q. B. D., 389.

The rule of damages in case of taking private property for public use has been exhaustively treated by this Court in Bomm Co. *v.* Patterson, 98 U.S. pp. 407-408.

Mr. Justice Field, in delivering the opinion of the Court, said: —

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference

to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated."

Apply these rules to the present case: —

An almost exhaustless supply of wholesome water is owned by your Orator. It cannot be diverted from him without just compensation. It is 148 feet above mean tide, capable easily of being raised much higher. It is within 30 miles of the city of Baltimore, and within 16 miles of the cities of Washington and Georgetown. The Act proposed to take it for the very use for which it is most valuable, and carefully forbids the appraisers to take into consideration that great source of value in forming their judgment of just compensation.

While we complain that the Attorney-General did not do anything that he ought to have done under this Act, it gives us pleasure to find that he put in force this unconstitutional and unjust part of the Act. We take his confession in the words following: —

"I requested Matthew G. Emery, Thomas J. Fisher, and Bernard H. Warner, appraisers appointed January 15, 1884, upon my application, by the Chief Justice of the District of Columbia, to fairly and justly value the same (lands) without reference to the value of the lands for the uses for which they were taken, and report such valuation to me." (Brewster's letter, Rec., p. 25.)

There is a very noticeable coincidence concerning the peculiarity of this rule of valuation which we have been discussing, which was passed July 15, 1882, as follows: —

"In making the valuation the appraisers shall only consider the "present value of the land, without reference to its value for uses "for which it is taken under the provisions of this Act." (See Act, Appendix, p. 2.)

Looking at the 23d finding of fact by the Court of Claims you will find it in these words: "The water drawn through the aqueduct "is distributed in the cities of Washington and Georgetown for the

"use of the United States Government in its buildings, navy-yard, "fountains, etc., and for the municipal and domestic uses of the said "cities and their inhabitants.

"The value of the water for the uses to which this is applied is "derived from its elevation, which will admit of its flow or descent "through the city; and when found at sufficient elevation to admit "of being distributed by its natural flow, it possesses a great value, "and is paid for by cities when taken from the control of private "owners, according to its value, depending, as before said, upon its "elevation." (See Appendix, p. 15. Also see Sect. 1057 U.S. Rev. Stat., Appendix, p. 16.)

This establishes the true rule of damages, as we have seen established in the Boom Co. case *ubi supra*, and was reported, according to the provision of the Statutes, to the Congress which commenced its session in December, 1881, being the same Congress which passed the Act for taking more lands and water-power of your Orator on the 15th July, 1882; and the promoters of that Act, seeing that under the rule established by the Court of Claims, which this Court also approved on appeal, passed this rule of valuation to take away the damages by legislative act which the party injured could otherwise acquire under the decisions of the Court.

Can any one doubt the origin and intention of this rule of valuation? Do we not find how it comes in the Act certainly under the rule of Paley's Moral Philosophy: when you find a watch you must infer a maker.

I suppose this Act, if it could have any effect, would bind any other tribunal as well as the appraisers.

But this need not be much argued, because nothing was done by that Board of Appraisers, and nothing could be done except what the Attorney-General chose to do, and he chose to do nothing. Therefore he was not a tribunal to award compensation provided for the injured party to which he could apply.

TRIAL BY JURY.

The opinion of the Court below in the matter of the injunction states "that the complainant is entitled to have his compensation assessed by jury, has been so often decided not to be a constitutional

requisite that it cannot be any longer regarded as an open question." That being so, of course the Court did not examine it.

This assertion is made in face of the fact, that in regard to the power of the United States to appoint any other tribunal than a jury, or to call upon the States to take property for Federal use, otherwise than by a jury, has never been exercised in any case; and there are but two *obiter* statements on which to base such opinion, and those cases were in fact tried by jury.

And that the great question: What is the effect of the inhibitions of Article I., Section 8, upon the right of eminent domain, has never yet been settled, or even discussed.

As this Court has several times, where it was not *obiter*, decided that the trial by jury is a constitutional requisite to taking by eminent domain, and as that has been the practice for a hundred years of national life, we shall venture to argue this point to the Court, and ask its consideration, although some State Courts may have been so far debauched by railroads and other enterprises as to come to a different determination. But they are few.

We insist that all assessments of compensation for private property taken by the United States for public use must be by jury, and this is the rule for the United States, whether it may be the rule for the States or not.

We submit that, if there is any one institution upon which the liberties of the people were supposed to depend, by the Fathers of the Republic, it was to have every question of disputed fact, and right of life, liberty, and property, tried by twelve men from the *vicinage*. They had witnessed, just before the framing of the Constitution, some attempt in England by the Courts to trench upon it in the trial for criminal libel; hence the only privilege and immunity which the Constitution in terms secured to citizens *of the United States* when first submitted to the States, was in these words: —

"The trial of all crimes, except cases of impeachment, shall be by jury, and such trial shall be held in such State where said crime shall have been committed." Art. III., Sect. 2.

It will be seen that this is a part of the same article which controls and limits the judicial power of the United States.

A part of the arraignment of King George by the Declaration of Independence was, "He has combined with others to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws, giving his assent to their acts of pretended legislation . . . for depriving us in many cases of the benefits of a trial by jury."

It is common knowledge that the omission of the Constitution to provide for trial by jury in matters of civil rights, while it gave appellate jurisdiction to this Court of both law and fact, called forth more opposition to the Constitution than any other provision.

The opponents to the Constitution declared, that the maxim of *expressio unius est exclusio alterius* shut out all jury trials in civil matters in the Federal judicial scheme, and the appellate jurisdiction in matter of law and fact gave the Court omnipotence over all judicial findings of fact; every argument in explanation was in vain, and the Constitution was only adopted upon the assurance of a majority of the States, that the Seventh Amendment, which preserved the trial by jury in all suits of common law where more than twenty dollars was involved, and held the decision of the jury in matters of fact a finality, should be adopted.

By the same article judicial power was extended by the Constitution to three classes of cases only, Law, Equity, and Admiralty. The amendment preserved the right of trial by jury to suits at common law, limited only by the amount in controversy.

Unless the taking of private property for public use by the United States constitutes a case, then the judicial power of the United States does not extend to it. If it is a case, it must be a case at law, for certainly it is neither a case in equity or in admiralty. Is the phrase, "Suit at common law," coextensive with "Case at law"? The words "Any suit in law or equity" are found in the Constitution otherwise only in the eleventh amendment, which declares the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, etc. In the judiciary act, passed by the same Congress which proposed the seventh amendment, "case" and "suit" are used as equivalents each of the other.

In Osborne *v.* United States Bank (9 Wheaton, 738), C.J. Marshall said, "That power (referring to judiciary power) is

capable of acting only where the subject is submitted to it by a party who asserts a right in the form presented by law; it then becomes a case."

In Cohens *v.* Virginia (6 Wheaton, 264) this Court said: "In law language a suit is a prosecution of some demand in a court of justice."

The proper construction of the words case and suit is so determined, *ex parte* Milligan. (4 Wallace, 131.)

The only question that remains is, whether a controversy in regard to the just compensation which shall be paid to a party for the taking of private property for public use is a case or suit at law within the terms of the constitutional amendment. We say that the third article of the Constitution, taken in connection with the amendment, in fact reads as follows: —

"The judicial power shall extend to all cases in law, equity, and admiralty, etc., and in the trial of all cases at law the right to trial by jury shall be preserved."

Let it not be overlooked that the amendment is the preservation by constitutional enactment of a right inherent in the citizen, and is not a provision creating such a right, but only preserving it.

That the whole people thought it a necessity that the right of trial by jury should be preserved is evident from the fact that the Constitution of every State which had a Constitution at that time does so preserve it. In the Appendix (pp. 18, 19, 20) we have given the constitutional provisions of the thirteen States in that regard. Connecticut had no Constitution, and Rhode Island only a charter.

We have no decisions upon this point in this Court in regard to the United States; but under the State Constitutions which we have cited there have been decisions to which we will call the attention of the Court.

Trial by jury to ascertain such damages was decided to be a constitutional requirement in *Charles River Bridge* v. *Warren Bridge*, (*11 Peters Rep., 420*), by a majority of this Court.

Taney (C.J.), giving the opinion says, p. 532: "In ascertaining the damages the claimant has a right to demand a jury, and that the damages shall be assessed in strict conformity to the principles of the law. To revise these cases would carve out for this court a new jurisdiction not contemplated by the Constitution, and which cannot be safely exercised."

The Chief Justice declares this constitutional principle of right to the ascertainment of just compensation by a jury as a reason why in no case the Supreme Court could interfere with the exercise of the right of eminent domain by the State. Story, J., dissented, but not on this point, which he fully admits to be as stated by the Chief Justice.

The same point was so decided in

Clark *v.* Utica, 13 Barbour Rep., 457.
Doe *v.* Stetson, 8 Maine, 365.
Issom *v.* Miss. R.R., 36 Miss. Rep. 300.

Contra:—

Raleigh R.R. Co. *v.* Davis, 2 Dev. & Batt., 457.

This case was so decided, because there was no provision in the State Constitution for compensation for taking private property for public use.

The Court says, page 460, "There is, however, no clause in that instrument — the Constitution — which seems to bear on the point, . . . unless it be that no freeman shall be disseized of his freehold, or deprived of his life, liberty, or property, but by the law of the land. . . . Yet, if that which appears to be just, or does not appear to be insufficient, be provided and offered by the Legislature, however it may have been fixed on, there is no ground for the interposition of the Courts!"

Evansville R.R. *v.* Miller, 30 Ind., 209, has been cited as a like contra decision. But that was a case in equity, and the Court says that in such cases a trial by jury is not a constitutional right. Still the Court submitted the case to a jury, to which an objection was taken and overruled.

The case Plank Road Co. *v.* Pickett, 25 Mo., 535, has been cited as contra. But the Court only held that a jury of five, appointed by the Legislature, though called a jury, might more properly be termed commissioners, who would be a proper tribunal, for which it cites Livingston *v.* Mayor of New York, 6 Wend., 85.

The Missouri Court seems to have been utterly oblivious of the 7th Article of the Constitution of New York: "That the compensa-

tion for private property shall be taken for any public use; the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three Commissioners appointed by a Court of Record, as shall be prescribed by law." The same Article, however, in case of roads, requires a jury of twelve freeholders to settle the compensation.

There was no such provision in the Constitution of Missouri.

So the case of Ames *vs.* R.R. Co., 31st Minn., 241, comes to a like determination. The case was twice argued upon wholly other points. The first decision took no notice whatever of this point, and in the reargument the question was not raised; but it appears in the decision that the taking of land, and the compensation to be given therefor, are not suits at common law.

This Court, in Kohl *v.* U.S., 91 U.S. R., 375, decides as follows: "The Judiciary Act of 1789 conferred upon the Circuit Courts of the United States jurisdiction of 'all suits at Common Law or Equity,' when the United States, or any officer thereof, serving under the authority of an Act of Congress, are plaintiffs. If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the Circuit Court. That it is a suit admits of no question."

If the pursuit of damages against the United States for property taken for public use is a suit at common law, as thus decided, why must not that suit at common law be determined by a jury, as all suits at common law, under the provision of Article VII. of the amendments to the Constitution of the United States, which we believe are agreed to be inhibitory upon the power of Congress?

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

We suppose it will not be denied that more than twenty dollars is at stake in this suit at common law.

There have been many decisions on this question in the several States, all of which will be found to have been determined upon the practice in regard to taking property for State uses, before their several Constitutions, or upon the special terms of the constitutional enactment in regard to trial by jury, — or upon the theory that such cases were not suits at common law, which latter, Kohl's case has exploded. In more modern constitutions legislative enactments

have been had to secure to the citizen the right to have his compensation for his property taken for public use determined by a jury in a court of justice.

Every advance upon this subject has been in favor of a jury.

Mitchell *v.* R.R., 68 Ill., 286.
Chicago R.R. *v.* Sandford, 23 Mich., 418.
Whitehead *v.* Arkansas R.R., 28 Ark., 460.

Arkansas Constitution, 1868, says: "The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury, according to the course of common law."

In some of these enactments it will be seen that a jury of twelve men is required, as if there was ever a jury of any other number since the days of the apostles.

A distinction has sometimes been made as to the mode of the ascertainment of that compensation, in case of the taking of an easement or incorporeal hereditament, and the taking of the fee. But this need not be discussed, as here the greatest right is taken, — the land in fee-simple.

The United States have never taken any lands heretofore by condemnation, without a jury has found the compensation. Kohl's case, *supra;* Burt *v.* Merchant Insurance Co., 106 Mass., 356, and several other cases in regard to the Boston Post-Office; Jones *v.* U.S., 109 U.S., 513.

If all citizens are not entitled to their constitutional rights to have compensation for property taken determined by a jury, still your complainant has in this case peculiar rights, other and different both as to compensation, and the manner of determining its amount, because of the acts and doings of the Government in this behalf, heretofore argued at length.

There is another reason why this assessment of damages should be submitted to a Maryland jury, and that is, because, by the common law, all such inquisitions are to be made by the people of the vicinage, who can visit and view the lands in question. Or as an inquisition by a sheriff's jury is on or near the lands. There should

be a view. The necessity of such a view to a proper estimate of damages has never been questioned, nor, where possible, has it ever been omitted.

The common-law writ of *ad quod damnum* always lay upon a grant of liberties made by the king.

Viner's Abgmt., Vol. 2, p. 126. Fitzherbert's natura brevium, 221–225; 1 Bur., 465; 3 Atkyns, 766.

This writ commanded the jury to go upon the ground, and the testimony of witness was merely called in to aid the jury. Besides, if there was one thing more certainly attached to the investigation of facts by the common law than another, it was a trial by freeholders in the vicinage. This Act removes this "suit" from the State of Maryland, which is one judicial district, under one jurisdiction, into the District of Columbia which is under another.

It may be answered that, in regard to the subsequent taking, the Government has made no request of Maryland to consent to the present taking. But is not the request to Maryland, and her action in accordance therewith, to be held to have the continual assent of that State as well to the jurisdiction as to the purchase of land and water in the same locus, and for the same purpose and precedent conditions? I assume the affirmative, because if this "purchase" is made without action in regard to the rights and jurisdiction of Maryland by the Government, then the defendants will find it very difficult to justify their expenditure of public money in building the dam in question, because, by the joint resolution approved September 11, 1841, it is resolved "that no public money shall be expended upon any site or land hereafter to be purchased by the United States for the purpose aforesaid" (*i.e.*, armories, light-houses or other public buildings whatever), "until the written opinion of the Attorney-General shall be had in favor of the validity of the title, and also the consent of the Legislature of the State in which the land or site may be shall be given to said purchaser."

This resolution was intended to prevent any conflicts between the Federal and State governments, as to territorial jurisdiction in case of the exercise of the right of eminent domain in case where no urgent exigency existed.

It was, by the 6th resolution of same date, resolved that, "It shall be the duty of heads of departments under whose directions lands for such purposes may be purchased, over which the United States have not jurisdiction, to apply to the State Legislatures for cession, and in case of refusal to report to the next session of Congress."

Did Congress, by the Act of July 15, 1882, intend to repeal said resolutions and override the jurisdiction of Maryland by the harsh power of eminent domain, especially as in the Act of July 15th the State of Maryland, or land being in Maryland, is not named or set forth?

It would seem not.

We now come to one of the most important, but perhaps not one of the most difficult, questions of our case, which is the fifth specifica- of error under the first assignment, in the following words: —

"In that the Act does not provide, nor is there any other provision of law by which the compensation for the property taken shall be paid, or any fund from which it shall be paid, save such as may hereafter be voted by the Legislature and approved by the accounting officers of the Treasury."

The constitutionality of an Act of Congress taking lands from a citizen for the use of the United States itself may allow the land to be entered upon for temporary purposes, such as surveys, before compensation is paid, need not be discussed save as it is in this case governed by the compact with Maryland.

But that such act of taking cannot be constitutional without a tribunal for the ascertainment of compensation, and a method by which payment can be enforced by such proper tribunal being provided, or a pledge of public faith that a distinct fund should be held by the Government for its payment, has never been denied, so far as we are advised.

The settled and fundamental doctrine is thus stated by Chancellor Kent: —

"The settled and fundamental doctrine is, that government has no right to take private property for public purposes without giving a just compensation; and it seems to be necessarily implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception,

concurrently in point of time with the actual exercise of the right of eminent domain. 2 Kent Com., 12th ed., 339, note f."

The doctrine is as fully stated as anywhere, in the case of Bloodgood *v.* Mohawk & Hudson River R.R. Co., 18 Wendell, 9, which we take leave to quote as follows: —

"I do not mean to be understood that the Legislature may not authorize a mere entry upon the land of another for the purpose of examination or of making preliminary surveys, etc., which would otherwise be a technical trespass, but no real injury to the owner of the land, although no previous provision was made by law to compensate the individual for his property if it should afterwards be taken for the public use. But it certainly was not the intention of the framers of the Constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the Legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided and upon an adequate fund; whereby he may obtain such compensation through the medium of the courts of justice, if those whose duty it is to make such compensation refuse to do so.

The same doctrine will be found in

Callison *v.* Hedrick, 15 Gatt., 244.
People *v.* Green, 3 Michigan, 496.
Jackson *v.* Winns Heirs, 4 Lit., 323.
Charleston B. R.R. Co. *v.* Middlesex, 7 Met., 78.
Ash *v.* Cummings, 15 N. H., 591.
White *v.* Nashville R.R., 7 Heisk., 518.
Simms *v.* R.R. Co., 12 Heisk., 621.
Brock *v.* Heisson, 4 Wis., 674.
State *v.* Messenger, 27 Minn., 119.
Loweree *v.* Newark, 38 N. J., 151.
Long *v.* Fuller, 68 Penn., 170.
People *v.* Hayden, 6 Hill, 359.

In this case the Court says: —

. . . "Before property is thus taken it is, I apprehend, the settled doctrine, even as respects the State itself, that, at least certain and ample provision must first be made by law (except in cases of

public emergency) so that the owner can coerce payment through the judicial tribunals, or otherwise, without any unreasonable or unnecessary delay; otherwise, the law making the appropriation is no better than blank paper.

"A provision for compensation is an indispensable attendant upon the due and constitutional exercise of the power of depriving an individual of his property." Gardner *v.* Newburg, 2 Johnson's Chancery, 162–168; Southwestern R.R. *v.* Telegraph Co., 46 Georgia, 43.

Ligat *v.* Commonwealth, 19 Penn., p. 460, decides: —

"It is the duty of the Canal Commissioners, in an affair so important as appropriating the real estate of the citizen to the public use, for permanent erections thereon, to indicate their determination by a resolution, duly adopted and entered on their journals, "describing and ascertaining the bounds of the land, and the quality and duration of the interest and estate in the same, which may be required for the use of the State."

Penrice *v.* Wallis *et al.*, 37 Miss., 183, declares: —

"This necessarily results from the principles settled by this Court in the late cases of Brown *v.* Beatey, 34 Miss. R., 227; Isom *v.* The Miss. Cen. R.R. Co., 36 Miss. R., 300, unless it could be made to appear that the case falls within the principle of necessity or of public protection, which demands immediate action, and cannot be made to await delays necessarily incident to judicial proceedings. It is readily conceded that such public emergencies may exist as will admit of no restraint. Such are the calamities of fire, of war, of pestilence, of famine, where the great principles of self-preservation are as important and as applicable to states or communities as to individuals. And the same principles are equally applicable to impending imminent danger from flood as of fire. But in either case, to justify the abandonment of all attempt at legal redress, imperative necessity must be at least apparently present. As long as there is ample time and opportunity to resort for remedy to the aid of the law, the plea of necessity affords no excuse, because of its falsity.

"In the case of Talbot *v.* Hudson, 16 Gray, 417, it was decided that where the Act of the Legislature taking the property required the Governor to draw his warrant on the Treasury for the payment

of damages (that being the mode in which money was taken out of the Treasury in Massachusetts) was a sufficient appropriation to sustain the constitutionality of the Act."

In the case of Orr *v.* Quimby, 54 N.H., 590, many of the questions to be considered in this case are discussed, and while the majority of the Court held that a State might authorize an entry upon land for the purpose of making surveys, yet the discussion by the Chief-Justice, of this question is so complete, and so vigorous that we cannot refrain from quoting it: —

"Eminent domain is the public power of making a compulsory purchase of private property for public use; and payment (either made, or, by agreement of the parties, to be made) is an essential part of the legal idea of a purchase, voluntary or compulsory, and without payment it is robbery. If the Constitution does not require payment as a condition indispensable to the legality of the compulsory purchase of the plaintiff's property, natural justice does not speak on the subject with any legal authority, or with any moral authority, that the Courts are at liberty officially to obey.

"Property, forcibly taken before compensation made or security given, is taken without compensation, without security, and without that observance of the reserved rights to which the public power is subject."

"The plaintiff's property has been taken by the public, under color of a compulsory purchase, and, for payment, he is recommended to the public mercy. Suppose he has a trifling claim, in contract or tort, against the most wealthy and honest man which it is morally certain will be paid as soon as the debtor is informed of its existence; the plaintiff, unnecessarily, unreasonably, and vexatiously, brings a suit; the defendant pleads a moral certainty of compensation, and the plaintiff demurs; the Court must sustain such demurrer. The moral certainty of mercy is not changed into a legal vindication of a constitutional right by the circumstance that the number of persons from whom mercy is expected is 40,000,000.

If we are at liberty to exercise an unlimited discretion, this demurrer should be sustained. "The moment the idea is admitted

into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect, anarchy and tyranny commence. If 'Thou shalt not covet' and 'Thou shalt not steal' were not Commandments of Heaven, they must be made inviolable precepts in every society before it can be civilized or made free."

6 Works of John Adams, 9.

Conn. River R.R. *v.* County Commissioners, 127 Mass., 52.

"Under our Constitution," said Chief-Justice Shaw, "the Act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owners. If the Government authorize the taking of property, for any use other than a public one, or fail to make provision for a compensation, the Act is simply void; no right of taking as against the owner is conferred; and that he has the same rights and remedies against a party acting under such authority as if it had not existed." So, in a case of laying out as a public highway a bridge owned by a private corporation, Mr. Justice Colt said: "The duty of paying an adequate compensation for private property taken is inseparable from the exercise of the right of eminent domain. The Act granting the power must provide for compensation, and a ready means of ascertaining the amount. Payment need not precede the seizure, but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay.

Haverhill Bridge *v.* County Commissioners, 103 Mass., 120–124.

ARGUMENT OF THIRD ASSIGNMENT OF ERROR.

The third assignment of error assumes that all the provisions of the Act are constitutional and binding upon the United States, and upon every officer who shall undertake to assert any authority or do anything for which he claims to be justified by the Act.

We suppose nothing is better settled than that when the Government exercises the power of eminent domain by taking the prop-

erty of the citizen, specially real property, that every step by which the taking is to be done, imposed by law, must be most strictly followed to make the taking effective and to screen its officers.

Every failure to strictly comply with the statute will make the officer a trespasser *ab initio*.

Kelly *v.* Horton, 2 Cow., 424.

He may also be enjoined.

Carpenter *v.* Grisham, 59 Mo., 247.

As if he enters upon land without having the damage assessed.

McCord *v.* High, 24 Iowa, 336.
Beckwith *v.* Beckwith, 22 Ohio State R., 180.

Every requisite of a statute having a semblance of benefit to the owner must be complied with.

Newell *v.* Wheeler, 48 N.Y., 486.
Stockell *v.* Nicholson, Walk. (Miss.), 75.
Mayor *v.* Delashee, 22 La. G. N., 26.
New Orleans *v.* Sohr, 16 La., 393.

But, how was this requisition of constitutional law met in this taking by the the officers having charge of its execution?

It is submitted that in the present case the intention of Congress was that there should be an appraisement of all the lands and rights taken, and a tender of the amount awarded as compensation, as a necessary preliminary step before entry or condemnation.

If that is not so, for what purpose was the following provision enacted: "On the application of the Attorney-General the Chief Justice of the Supreme Court of the District of Columbia shall appoint three persons, not in the employ of the Government or related to the claimants, to act as appraisers, whose duty it shall be, upon receiving from the Attorney-General a description of any tract or parcel, the ownership of which is claimed separately, to fairly and justly value the same, and report such valuation to the Attorney-General, who, thereupon, shall, upon being satisfied as to the title to the same, cause to be offered to the owner or owners the amount fixed by the appraisers as the value thereof; and if the offer be accepted, then upon the execution of a deed to the United States,

in form satisfactory to the Attorney-General, the Secretary of War shall pay the amount to such owner or owners from the appropriation made therefor in this act." It is alleged in the bill, and the fact is admitted by the letter of the Attorney-General to the Senate, put in the record by defendants, p. 30, that nothing was done in this behalf. In the language of the decision, Newell *v.* Wheeler, above cited, was not this appraisement of compensation for the lands and water-rights taken, and the tender of the amount so found, a requisite of the statute having some semblance of benefit to their owners? If fair appraisers had found what the referees found, the complainants would have taken it as we will now, if we are given access to the overflowing water so we can use it.

Bearing upon the question whether any property for the Washington aqueduct was intended to be condemned by Congress as distinguished from "purchased," we will call the attention of the Court to what was done by the United States on the Virginia side of the river.

They applied to the State of Virginia for land for the dam of the Washington aqueduct, and materials for building it, and cession of jurisdiction. Virginia passed an Act on the 3d of March, 1854, entitled: —

"An Act giving the consent of the Legislature of the State of Vir-
"ginia to the purchase of lands by the United States for the Washing-
"ton aqueduct, and ceding jurisdiction over the same."

After making substantially the same recitals as in the case of the Maryland Act (Brief, p. 3, the Act of assent of Maryland), the consent of this State is given to the United States to purchase land necessary for an abutment and quarries for the construction of a dam across the Potomac river, above the Great Falls, not exceeding ten acres, and to exercise concurrently with the State of Virginia such jurisdiction as may be necessary; *provided, however*, that nothing in this Act shall be so construed as to affect in any measure the rights of any individuals or incorporated company within the limits of this State; *provided, however*, the State of Virginia may resume jurisdiction thereof whenever the Federal Government shall cease to use it for the purpose of aiding in the supply of water, . . .

. . . . . .

or whenever the General Assembly shall think proper.

Does not this show that Congress never meant to take by condemnation, land for this enterprise? They accepted the Act of Virginia, in which they are expressly prohibited to affect in any manner the rights of any individual or company, and, acting under that State legislation, bought a little piece of land on the Virginia side of the river; this is the United States land mentioned by the Attorney-General in his notice of taking in these words: "and connecting the United States' property on Falls Island and Hard-to-come-at *with the United States' property on the Virginia shore.*"

Dyckman *v.* The Mayor, etc., of New York, 5 New York Reports.

"In the present instance, the Statute authorizes the exercise of this power, in cases where the commissioners and owners disagree as to the amount of compensation. The Legislature manifestly intended to give the owner the benefit and opportunity of a voluntary sale, and required the respondents to make a fair and honest effort to purchase the land of him, before commencing proceedings to take it adversely.

"The duty of proving the disagreement in this case lay upon the respondents, for the rule is, that the party who claims title under the exercise of the right of eminent domain must show affirmatively that the requirements of the Statute have been complied with."

See also Burt *v.* Brigham, 117 Mass., 307.
Rutenbaugh *v.* Chester Valley R.R. Co., 21 Penn. R., 100.
U.S. *v.* Reed, 56 Mo., 565.

In accordance with the provisions of said Act "the Secretary of War" did not within reasonable time "cause a survey to be made and map of the land necessary for a dam across the Potomac river at Great Falls, including the land now occupied by the dam, and the land required for the extension of said dam across Conn's Island to the Virginia shore," sufficient with any degree of accuracy, as such surveys should have been made, to be the foundation of passing title to the land and water-rights of your complainant necessary for the purposes of said Act, which map and survey, by the terms of said Act, were to be delivered to the Attorney-General before he could or did take any procedure in regard to the taking of said land.

By the report of the Attorney-General (Rec., p. 24), it appears that "on the *17th of August* (1883) I received from the Secretary of War a description of the land *deemed by him necessary for a dam* across the Potomac river at Great Falls, including the land now occupied by the dam, and the land required for the extension of said dam across Conn's Island to and upon the Virginia shore, together with maps and surveys. Thereupon, commencing on the 21st of August, 1883, I published (for 30 days) the description so transmitted, with a notice that the same had been taken for the purposes mentioned in said Act, and notifying all claimants to any portion of said premises to file, within the period of publication (*i.e.*, 30 days), in the Department of Justice, a description of the tract or parcel claimed, and a statement of its value as estimated by the claimant."

It is thus seen that no description, map, or survey, however insufficient, was made and put in the hands of the Attorney-General by the Secretary of War for more than *thirteen* months after the passage of the Act, and that in the meantime nothing had been done according to the statute by the Attorney-General or Secretary of War, which requires them to proceed to acquire to and for the United States the outstanding title, if any, to said lands and water-rights. (Act, Sect. 1, Appendix p.)

The land was thereupon immediately condemned without anything being done to acquire title to said land before condemnation, as provided for by said Act. On the contrary, the report of the Attorney-General admits that within four days he published notice (Rec., p. 33), which, after reciting his prior proceedings, wherein he claims to have done nothing according to the statute in conjunction with the Secretary of War, or separately, to "acquire title to said lands," he proceeds to say, "whereas such map and survey have been completed, now, therefore, in accordance therewith, and under the above requirements, I hereby give notice *that the several parcels of land and water-rights below described, have been taken for the uses above indicated.*" (Rec., p. 34.)

This Head of the Department of Justice immediately proceeded to condemnation of the land, the description of which he received from the War Department, declaring it "taken."

. . . . . .

"(*c.*) Land for dam, etc., at Great Falls.

"1. For extending the dam to and upon the Virginia shore it is proposed to take and acquire title to a strip of about 918 feet wide, crossing Conn's Island and the Virginia channel, and connecting the United States property on Falls Island and Hard-to-come-at with the United States property on the Virginia shore. This will extend the present limits of the United States property on the Virginia shore to the south, by taking in a triangular lot containing about 0.8 acre.

"This tract is colored in yellow on tracing C.

. . . . . .

"4. In addition to acquiring to and for the United States any outstanding title to these lands at the Great Falls, it is also proposed to acquire all water-rights implied in the possession of the same, or needed for purposes contemplated by the Act under which these proceedings are taken.

"The map of the surveys (in three tracings) required for the uses enumerated in the above-named Act of 1882, Chapter 294, may be seen at this Department by all claimants to any portion of said premises; and they are hereby respectively notified to file, within the period of the publication of this advertisement, in the Department of Justice, a description of the tract or parcels of land respectively by them claimed, and a statement of their value as by each claimant estimated."

How could the owner of the land and water tell from a "tracing" how much land or water-power had been "taken"? This was all the information he got.

Attention is now called to the description of the property to be taken in the notice. It is defective in several important particulars. The only description of the land taken is a tracing in yellow of 0.8 of an acre. No survey or designation whatever of boundary or position is given. No tracing even is given of the land to be flowed by the dam, and the case finds that the company has nearly one thousand acres of land bordering on the river. No indication by cubic feet or gallons is made of the water taken. The only statement is that no water is taken. It is only proposed to acquire all water-rights implied in the possession of the lands taken or needed

for the purposes contemplated by the Act, *i.e.*, an Act to increase the water-supply of the City of Washington, and for other purposes. How much water does an Act contemplate? How much is needed, or will be needed? No word is said of that. What water-rights are implied by the possession of land? The notice is silent. Remember this is a document from the Department of Justice, representing sixty millions of people, describing the property of one of its citizens which the law requires the Head of that Department to have appraised and pay for, and have a deed thereof, according to the description in this notice; nothing else. What land, what water-rights, how much water, would such a deed convey? The amount of water is what the Act contemplates; but the Act only contemplates an increase, without saying how much, and a gallon would be an increase.

Is it possible that the Court will require the party to go and make a valuation under such a notice, upon the pain of forfeiting his title to this large and valuable property?

We suppose the doctrine stated in the third specification under the third assignment of error, in the words following, to be perfectly well settled: —

"Because, if the officers charged with the execution of this Act do on the land anything not authorized and directed by the Act, or take any other, or different, or more property, or for any other purpose than they are permitted by the Act, then such officers become trespassers *ab initio*, and should be enjoined, and other relief against them be afforded." (Currier *v.* Marietta & Cincinnati R.R. Co., 11 Ohio St., 228.)

The only question is, Have these officers exceeded their authority? That fact is averred in the bill, and is beyond question so far as the present discussion of this case is concerned.

The Act provides and appropriates money for the completing of a dam at Great Falls to the level of 148 feet above tide, and extending the same to the Virginia shore. (See Appropriations in said Act.)

The bill alleges (Rec., p. 18) that the present dam, as found by

the decision of the Court of Claims, was at the level of 148 feet and 3 inches above *mean tide*, and that the word "tide" is used in the Acts of Congress in reference to a well-known and understood "bench-mark," or measurement, fixed in the foundation of the Capitol, as the height of mean tide at Washington, from which all tide measurements are determined; and that the phrase "one hundred and forty-eight feet above tide" referred to that alone. And the bill then alleges that the defendants mean and intend to build a dam, and are building the same to a greater height than 148 feet above mean tide, claiming that the word "tide" may be construed to require 148 feet to be so much above the highest tide at Washington. The finding of the Court of Claims establishes the height of the present dam, which was to be completed at 148 feet 3 inches above mean tide. (See Finding of Fact XVIII., Appendix, p. .) The bill alleges this bench-mark to be the one to which reference was made in the Act. That is admitted. Any construction which would make "above tide" mean "above high tide" would give a bench-mark as a basis of measurement which would change with every season. And yet the Court below refused to enjoin the defendants and their agents from building higher 148 feet above mean tide, or investigate the question under our bill. To build a dam a foot higher would be to take many thousand gallons of water more from your Orator; would flow its lands much higher, and yet, under the provisions of the Act of Congress, the Court of Claims could give no pay for any dam taking more than 148 feet above mean tide; and Congress has not empowered anybody to build a dam higher than that.

AS TO FILING PETITION IN THE COURT OF CLAIMS.

We advert to another averment in the bill to meet any argument to the prejudice which may be brought against your Orator because thereof, which is in the words following (Rec., p. 15):—

"And your complainant is informed and believes, and therefore avers, that no proper legal steps, as required by Statute, were duly taken by said Attorney-General and Secretary of War, or either of

them, or have been by their successors, or either of them, in said offices, which are requisite and necessary for the condemnation of said lands, or taking the same in due manner and form for public use, or for making compensation or causing compensation to be made therefor to your complainant.

"And your complainant is also informed and believes, and therefore avers, that your complainant waited after several applications, both verbally and in writing, by its chief executive officer, made to said Attorney-General and Secretary of War, till the *last day before* the expiration of the year limited by said Act in which claims might be filed for damages under said act in the Court of Claims, hoping and expecting some steps might be taken by which the land and water rights belonging to your complainant might be legally taken by the United States in such form that your complainant might obtain reasonable compensation for its property taken; and nothing being done, from great caution and fear lest the complainant might lose all benefit of any provision of said Act by limitation, it then filed a petition setting forth its claim in order to save the rights of your complainant, and for no other purpose whatever; and your complainant protests that it believes that no sufficient steps have been taken in this regard to give said Court of Claims jurisdiction in the premises, because your complainant says all said acts of said Attorney-General and Secretary of War and other servants of themselves and the United States in and about said lands and in the premises were not justified by Act of Congress, and therefore are simple trespasses and wrongs done to your complainant, because of which, and the injuries inflicted thereby, said Court of Claims has no jurisdiction whatever."

The Orator filed its claim the 22d of August, 1884, being the last day on which it could be filed, and if your Orator was wrong in point of law, in construction of the Act, it would lose all title to its lands and water if its claim was not filed within one year from the publication of the notice of the Attorney-General, as above provided (Appendix, p. 2), together with all claims for value or damages on account of ownership, or any interest in said premises, or on account of any interest or property right, by a construction of said work, would be forever barred.

Again, upon publication of the notice above directed, the Secretary of War might take possession of the premises embraced in the

survey and map, and proceed with the construction of the works herein authorized. "And upon payment being made therefor, or without payment upon the expiration of the time above limited, without the filing of a petition, an absolute title to the premises shall vest in the United States."

It is said in the Opinion on the matter of injunction (Rec., p. 44) that "the filing of this petition in the Court of Claims is a waiver of the fulfilment of the requirements of the Statute in the manner and matter of the taking. It will be seen that all the things had been done that ever were done by the Attorney-General and Secretary of War before the 22d day of August, 1884, and the Attorney-General himself says in his letter (Rec., p. 4) in regard to your Orator that he did nothing upon the subject of the appraisement, made no examination of title, nor attempted to acquire the title, because it would take time for the examination of witnesses. How can it be said that a man waives any right as against the Government when the Government passes an Act to take his land from him, tells him the way it shall be taken, and how it shall be paid for, and then its officers refuse to do anything about taking his land in consonance with that Act; and then the Act provides that if the injured party does not file a certain petition within a certain time it must lose title to all its property, and lose compensation, and his remedy shall be forever barred, and the injured party thereupon files, on the last day possible to save his rights, his petition, that thereby he waives the doing in his behalf of everything that the law has provided shall be done, and which is still undone? It is not believed that any case of such waiver, under such circumstances, can be found in the books. Indeed, it never has been set up before. An injured party should not be held to waive any provision in his favor which may aid him in getting his rights when his property has been taken from him without any compensation made by the Government.

There is another answer, however, and that is that the reasons for filing a petition in the Court of Claims are stated in the bill, and averment made that there was no intention to waive any antecedent acts, or want of acts, on the part of the Government or its officers; and as it was coupled with a complaint that they had not done those acts, the demurrer admits that there was no waiver intended to be done, or done by filing the petition.

RESULT.

If your Orator's bill in equity is sustained by the judgment of the Court, that only will be done which the Government ought to have done, and which, in Kohl's case, this Court said of right could be done, — that a suit shall be maintained in the Circuit Court of the United States, in the Maryland District, where the property taken lies, in which, after the fullest investigation, the rights of the Government and of the injured party can be ascertained. The Government could have, and ought to have, brought such a suit, several years ago. It has not so done, and we only ask the Court to put the injured party in condition to have a suit in a proper Court, to enforce its just rights. If we can have that remedy we hereby waive all asking for injunction to prevent the building of the dam, which has now been completed fifteen inches higher than it was authorized by Statute.

All of which is respectfully submitted.

BENJ. F. BUTLER,
of Counsel.

APPENDIX.

AN ACT TO INCREASE THE WATER-SUPPLY OF THE CITY OF WASHINGTON, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the Secretary of War shall cause to be made a survey and map of the land necessary to extend the Washington Aqueduct from its present eastern terminus to the high ground north of Washington, near Sixth street extended, and of the land necessary for a reservoir at that point the capacity of which shall not be less than three hundred million gallons; and a like survey and map of the land necessary for a dam across the Potomac river at the Great Falls, including the land now occupied by the dam, and the land required for the extension of said dam across Conn's Island to and upon the Virginia shore; and when surveys and maps shall have been made the Secretary of War and the Attorney-General of the United States shall proceed to acquire to and for the United States the outstanding title, if any, to said land and water-rights, and to the land on which the gate-house at Great Falls stands by condemnation.

And in obtaining title to the right of way for the extension of said aqueduct, the Secretary of War and Attorney-General may in their discretion, secure title to a strip suitable for an avenue over such part of said aqueduct extended as they think proper: *Provided*, That at least one-half in value of such right of way shall be donated or dedicated by the owners to that public use: *And provided further*, That if it shall be necessary to resort to condemnation, the proceeding shall be as follows:

When the map and survey are completed, the Attorney-General shall proceed to ascertain the owners or claimants of the premises embraced in the survey, and shall cause to be published, for the space of thirty days, in one or more of the daily newspapers published in the District of Columbia, a description of the entire tract or tracts of land embraced in the survey, with a notice that the same has been taken for the uses mentioned in this act, and notifying all claimants to any portion of said premises to file, within its period of publication, in the Department of Justice, a description of the tract or parcel claimed, and a statement of its value as estimated by the claimant. On application of the Attorney-General, the chief-justice of the supreme court of the District of Columbia shall appoint three persons, not in the employ of the government or related to the claimants, to act as appraisers, whose

Appendix.

duty it shall be, upon receiving from the Attorney-General a description of any tract or parcel the ownership of which is claimed separately, to fairly and justly value the same and report such valuation to the Attorney-General, who thereupon shall, upon being satisfied as to the title to the same, cause to be offered to the owner or owners the amount fixed by the appraisers as the value thereof; and if the offer be accepted, then upon the execution of a deed to the United States in form satisfactory to the Attorney-General, the Secretary of War shall pay the amount to such owner or owners from the appropriation made therefor in this act.

In making the valuation the appraisers shall only consider the present value of the land without reference to its value for the uses for which it is taken under the provisions of this act.

The appraisers shall each receive for their services five dollars for each day's actual service in making the said appraisements.

Any person or corporation having any estate or interest in any of the lands embraced in said survey and map who shall for any reason not have been tendered payment therefor, as above provided, or who shall have declined to accept the amount tendered therefor, and any person who, by reason of the taking of said land, or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may, at any time within one year from the publication of notice by the Attorney-General, as above provided, file a petition in the Court of Claims of the United States setting forth his right or title and the amount claimed by him as damages for the property taken or injury sustained; and the said court shall hear and adjudicate such claims in the same manner as other claims against the United States are now by law directed to be heard and adjudicated therein: *Provided*, That the court shall make such special rules in respect to such cases as shall secure their hearing and adjudication with the least possible delay.

Judgments in favor of such claimants shall be paid as other judgments of said court are now directed to be paid; and any claimant to whom a tender shall have been made as hereinbefore authorized, and who shall have declined to accept the same, shall, unless he recover an amount greater than that so tendered, be taxed with the entire cost of the proceeding. All claims for value or damages on account of ownership of any interest in said premises, or on account of injury to a property right by the construction of said works, shall, unless a petition for the recovery thereof be filed within one year from the date of the first publication of notice by the Attorney-General, as above directed, be forever barred; *Provided*, That owners or claimants laboring under any of the disabilities defined in the statute of limitations of the District of Columbia may file a petition at any time within one year from the removal of the disability.

Upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map, and proceed with the constructions herein authorized; and upon

payment being made therefor, or, without payment, upon the expiration of the times above limited without the filing of a petition, an absolute title to the premises shall vest in the United States.

SECT. 2. That the Secretary of War be, and is hereby, authorized and directed to extend the Washington Aqueduct from its present eastern terminus to the high ground north of Washington, near Sixth street extended; and that he construct at that point a reservoir of the capacity of not less than three hundred millions gallons, erect the necessary gate-house, and lay such main-connections as may be necessary to furnish to Washington and Georgetown an ample supply of water; and that he complete the dam at Great Falls to the level of one hundred and forty-eight feet above tide, and extend the same at that level across Conn's Island to the Virginia shore; and that he raise the embankment between the Potomac River and the Chesapeake and Ohio Canal above the dam, so as to protect the canal from the increased flooding which the completion of the dam will cause in times of high water, or pay to the canal company, in full satisfaction for all such flooding, the amount hereinafter appropriated for that purpose.

SECT. 3 That the following sums, or so much thereof as may be necessary, are hereby appropriated out of any money in the Treasury not otherwise appropriated:

To pay for land to extend aqueduct, fifty-one thousand three hundred and seventy dollars.

For extension of aqueduct to the high ground north of Washington, near Sixth street extended, five hundred and ninety-nine thousand five hundred and thirty-four dollars and fifty-five cents.

For necessary main-connections, one hundred and sixty-five thousand four hundred dollars.

To pay for land for reservoir, thirty-five thousand two hundred and fifty dollars.

For work and material in constructing reservoir and gate-house, four hundred and thirty-one thousand two hundred and seventy-three dollars and seventy-five cents.

To pay for water-rights and land necessary to extend dam at Great Falls to the Virginia shore, forty-five thousand dollars.

For work and material to complete the dam at Great Falls to the level of one hundred and forty-eight feet above tide, and extend the same to the Virginia shore, one hundred and forty-five thousand one hundred and fifty-one dollars.

To protect the Chesapeake and Ohio Canal from increased flooding by reason of completing the dam at Great Falls, twelve thousand three hundred dollars.

To provide for the erection of suitable fish-ways at the Great Falls of the Potomac, and at the dam to be constructed under the provisions of this act, in accordance with plans and specifications to be prescribed by the United States Commissioner of Fish and Fisheries, fifty thousand dollars, or so much thereof as may be necessary: *Provided further*, That one-half the cost of said improvement, excluding the fish-way,

Appendix.

shall be annually computed and stated by the Treasurer of the United States, and charged to a capital account on the books of the Treasury, and that interest at the rate of three per centum per annum thereon shall be annually computed and charged to said account, and that any surplus of water rents over and above the expense of maintaining the works and appendages and paying the charges for interest and sinking fund for the redemption of outstanding bonds heretofore issued for the extension of said water works in the city of Washington shall be paid into the Treasury of the United States by the officer who may be charged with the collection of the same, and credited to the account thus created, until the same shall be finally extinguished and the water rents shall be so regulated from time to time as to be at least sufficient to pay the expenses of maintaining the said works and appendages and the interest on the capital account created in accordance with this provision in addition to charges now imposed thereon by law. After the extinguishment of said account and until further action by Congress the surplus water rents shall be paid into the Treasury of the United States.

Approved, July 15, 1882.

FINDINGS OF FACT BY THE COURT OF CLAIMS.

The following findings of fact, were made by the Court of Claims in the case of the Great Falls Manufacturing Co. *v.* The United States, and by reference made part of bill of complaint. (See Rec. p. 8.)

I.

The Great Falls Manufacturing Company is a corporation established by the laws of the State of Virginia, having its domicile at the Great Falls of the Potomac, in Fairfax County, Virginia.

II.

The river Potomac, which flows past the cities of Washington and Georgetown, in the District of Columbia, furnishes the most convenient and available source of supply of water at sufficiently high level to be distributed through those cities.

About sixteen miles above these cities, in the State of Maryland, are situated the Great Falls, which form a series of rapids in the river, extending for about half or three-fourths of a mile, in the course of which the river falls about 70 feet.

III.

From the foot of these rapids to the tide-level at these cities there is a further descent of the river of about 70 feet.

From any point below, and not including these rapids, there is not a sufficient elevation to admit of its distribution by aqueduct.

From any point above these rapids there is sufficient elevation for such distribution by aqueduct.

IV.

Commencing at a point just above these rapids, an island, known as Conn's Island, extends up the river for about half a mile, lying nearly parallel with the Maryland shore, and considerably nearer to the Maryland than to the Virginia shore.

The island is of irregular width, averaging about 800 feet; that being about its width in the line of prolongation of the present dam.

From Conn's Island to the Virginia shore is about 1,400 feet.

At the head or upper end of Conn's Island, extending up the stream, are three or four small islands, called the Cyclades, there being narrow channels separating them from each other and from Conn's Island.

V.

Conn's Island is of irregular height. From its head to the dam near the foot of the island there is a descent of the river of about 5 feet.

VI.

A tract of land, known as the Toulson tract, is situated on the Virginia side of the river. It is bounded by and extends along the river, from a point opposite the middle of Conn's Island to a point below the Great Falls, and extends back from the river a distance of about half a mile.

A considerable portion of this tract is elevated ground, well adapted to the construction of mills and manufactories, and for supplying them with water-power from the river, and by appropriate canals, races, or other artificial water-ways.

VII.

Before the construction of the works of the Government, Conn's island divided the Potomac river into two unequal channels, about 98 per cent. of the water passing through the Virginia channel, and 2 per cent. through the Maryland channel, at low water; the total flow at low water being estimated at about 1,065 cubic feet per second, about 700,000,000 gallons per diem.

VIII.

On the 31st of August, 1852, Congress appropriated $5,000 to enable the President to cause the necessary surveys to be made to determine the best method of affording the cities of Washington and Georgetown an unfailing and abundant supply of pure and wholesome water, and in execution of this act President Fillmore transmitted to

Appendix.

Congress the report of General J. G. Totten, of the Corps of Engineers, recommending the construction of an aqueduct from the Great Falls.

IX.

On the 3d of March, 1853, Congress appropriated $100,000 for the purpose of bringing water into the City of Washington, upon such plans and from such places as the President should approve; provided that, if the plan adopted by the President of the United States should require water to be drawn from any source within the limits of the State of Maryland, the assent of the Legislature of that State should first be obtained; and on the 3d of May, 1854, the Legislature of Maryland passed the statute hereinbefore recited.

X.

The following appropriations were from time to time made by Congress with reference to the aqueduct: —

For cost of Aqueduct and its appurtenances:		
August 3, 1852.	For surveys, projects, and estimates	$5,000
March 3, 1853.	General	100,000
March 3, 1855.	"	250,000
Aug. 18, 1856.	"	250,000
March 3, 1857.	"	1,000,000
June 12, 1858.	"	800,000
June 25, 1860.	"	500,000
July 15, 1870.	Completing distributing reservoir	30,000
"	Completing two gate-houses	20,000
"	Completing arch over reservoir, rail, etc	4,000
"	For cleaning out Maryland channel near dam	5,500
March 3, 1871.	Finishing coping, railing, etc., bridges 1, 2, 3, 4	10,000
"	Completing gate-houses at District reservoir	20,496
"	Completing high-service reservoir	4,000
"	Ventilators over conduit	2,800
"	Fencing reservoirs	3,600
"	Building office at Rock Creek bridge	3,300
"	Earthwork and slope wall of division dam	20,000
"	Slope wall of distributing reservoir	20,000
June 10, 1872.	Completing parapets of bridges	13,934
"	Dial telegraph	2,500
"	Excavation of District reservoir	11,550
"	Cast-iron pipe, central to effluent gate, etc.	22,932
March 3, 1873.	Wooden fence at District reservoir	1,500
"	Dwelling for gate-keeper	2,500
"	Completing stone bridges	8,600
June 23, 1874.	Wooden fence at Great Falls	1,500
"	Dwelling and office at Great Falls	3,000
"	Four dial instruments	1,100
March 3, 1875.	Roof for gate-house, etc., Great Falls	3,000
"	Dwelling, office, etc., receiving reservoir	3,000
		$3,365,229
	Cost of condemning and macadamizing Aqueduct road	60,489
	Maintenance, regular annual repairs, expenses, etc.,	189,000
	Miscellaneous repairs	44,000
	Total appropriations to and including March 3, 1867	$3,658,718

XI.

On the 27th of July, 1858, at the instance of the United States, a justice of the peace in Montgomery County, Maryland, issued his *venire* to the sheriff for a jury to assess the damages which the dam of the Washington Aqueduct, proposed to be constructed, should cause to the Great Falls Manufacturing Company, of which due notice was given to the company.

On the 20th of August, 1858, an inquisition was duly taken under said proceedings, and the damages of the claimant assessed at the sum of $150,000.

On the 8th of November, 1858, the United States moved the Circuit Court of Montgomery County to set aside the inquisition; and on the 10th of March, 1859, it was adjudged that the inquisition be set aside, and that another inquisition be taken in the manner directed and prescribed by the original warrant in the case.

XII.

Nothing further was done by way of condemnation or purchase until the 20th of November, 1862, when the Secretary of the Interior and the claimants entered into the following agreement: —

ARTICLES OF AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES, PARTY OF THE FIRST PART, AND THE GREAT FALLS MANUFACTURING COMPANY, PARTY OF THE SECOND PART.

Whereas the party of the first part desire to use a portion of the water of the Potomac river, at the Great Falls, for the purposes authorized by Congress; *and whereas* the said party of the second part claim to own certain lands at said locality, and certain water rights attached thereto; *and whereas* all efforts to adjust said claims have heretofore failed, after great cost and loss of time on both sides, and no progress has been made in the settlement of the said controversy, and proceedings, in the absence of any agreement, must be commenced *de novo*, involving great loss of time and large expenditures of money, and again proving unavailing from the want of adequate legislation on the part of the States of Maryland and Virginia, and the intrinsic difficulty of the case; *and whereas* the party of the first part is anxious to prosecute this great work with as little delay as possible: now, then, with a view to a prompt, fair, and final settlement of this controversy, it is agreed between the said parties as follows: —

ARTICLE 1. All the claims of the party of the second part for compensation or damages for the occupation and use of the party of the first part of any land or water rights and privileges claimed by the party of the second part shall be submitted to the arbitrament of Jesse L. Williams, of Indiana, Hon. B. R. Curtis, of Massachusetts, Hon. G. Swan, of Ohio, Linus Child, Esq., of Massachusetts, and Hon. George M. Dallas, of Pennsylvania, the award of a majority of whom shall be final and conclusive, except as hereinafter stated.

ARTICLE 2. The party of the second part shall file with the arbitrators a specific description of the lands to which they claim title, and which they allege will be affected by the improvements made or proposed to be made by the party of the first part, and the arbitrators shall act in the premises as though the title of the party of the second part to said land is valid; but any award they may make shall not be binding upon the party of the first part unless the Attorney-General of the United States shall decide that the party of the second part has a valid title to said land.

Appendix.

ARTICLE 3. The said arbitrators, upon such description being filed with them, shall examine into, decide upon, and award the amount of compensation, if any, to which the party of the second part shall be legally entitled for the use and occupation, by the party of the first part, of the land, water rights and privileges claimed by the party of the second part, and all consequential damages to the property and rights of said company, which they may legally claim by reason of the plans and operations which may be adopted and carried into effect by the party of the first part, connected with and growing out of the location and construction of dams and other works of the Washington Aqueduct.

ARTICLE 4. If either party should be dissatisfied with said award, the party so disputing, within a period not exceeding thirty days from the date thereof, may proceed by bill in equity, filed in the Circuit Court of the District of Columbia, to set aside or change said award, and to obtain from said court such decree as in their judgment would be just and equitable, otherwise said award shall be final and conclusive.

ARTICLE 5. If either party should be dissatisfied with the decree of said Circuit Court the said party may, within a period from the date of said decree, not exceeding thirty days, take an appeal to the Supreme Court of the United States; but if no such appeal be made within the period limited, the said decree of the said Circuit Court shall be final and conclusive.

ARTICLE 6. If said case should be taken on appeal, as aforesaid, by either party, to the Supreme Court of the United States, the decree of said tribunal, both as to the law and the facts, shall be final and conclusive.

In witness whereof, the United States, by the Secretary of the Interior, has executed the same and set thereto the seal of the Department, and the said Great Falls Manufacturing Company have signed the same, by their president, and attached thereto their corporate seal.

November 20, 1862.

[L. S.] CALEB B. SMITH,
Secretary of the Interior.

[L. S.] CYRUS MOORE,
President of the Great Falls Manufacturing Company.

Test:
JOHN CARROLL BRENT,
Secretary of the Great Falls Manufacturing Company.

MEMORANDUM.

Before the arbitrators named in the foregoing and annexed submission enter upon their office, the said submission is hereby amended in the following particulars: —

1st. It is agreed that the name of Hon. Alonzo C. Page, of New York, be, and the same is hereby, substituted in place of George M. Dallas in the said submission.

2d. That inasmuch as Judge Swan, named as one of said referees, cannot serve, it is agreed that the arbitrators shall proceed without him and make their award; and in case of an equal division among them, so that no award can be made, it is further agreed the said arbitrators shall select another member, to be taken from the legal profession, and indorse his appointment hereon; and the award of the five shall be final as though Judge Swan had served.

(The Hon. Joseph B. Swan having accepted the appointment as arbitrator in this case, and being now here present, this 18th day of July, 1863, it is hereby mutually agreed between the United States and the Great Falls Manufacturing Company that this second amended article be, and the same is hereby, expunged.

BOSTON, *February 18, 1863.*

JOSEPH H. BRADLEY,
For the United States.

C. CUSHING,
Great Falls Manufacturing Company.)

Appendix.

3d. The arbitrators are hereby further authorized to award on the costs of this submission and their award, and their award in this last respect to be final and conclusive between the parties hereto.

In testimony whereof, this addition to the said submission is signed by the Acting Assistant Secretary of the Interior on the part of the United States, and the seal of that Department annexed, and Cyrus Moore, the President of the said Great Falls Manufacturing Company, and the seal of said company annexed.

[L.S.] J. P. USHER,
Acting Secretary.

[L S.] CYRUS MOORE,
President of the Great Falls Manufacturing Company.

JOHN CARROLL BRENT,
Secretary.

XIII.

Pursuant to this agreement the United States and the claimants appeared before the commissioners chosen under the agreement. Witnesses were examined, and documentary evidence was submitted by both parties, and arguments of council were heard.

On the 28th of February, 1863, the commissioners filed their report estimating the damages to the claimants which would result from the erection of a dam according to either of four several plans submitted to them. The report is as follows: —

Pursuant to the submission on file in the Department of the Interior, a certified copy whereof is hereunto annexed, the subscribers, the referees therein named, having met the parties, the said Great Falls Manufacturing Company, filed with the arbitration a specific description of the lands to which they claim title, and which they allege will be affected by the improvements made, or proposed to be made, by the United States, and which description is marked No. 1, B. R. C., together with the plat marked No. 2, B. R. C.; said Nos. 1 and 2 being returned with this award, are to be deemed and taken as referred to, and made part of the same, so far as the nature of the subject may require. And the United States also filed with the arbitrators the specifications of their proposed plans of operations, which are marked No. 3, B. R. C., together with a plat marked No. 4, B. R. C., said Nos. 3 and 4 being returned with this award, and to be deemed and taken as referred to, and made part of the same, so far as the nature of the subject may require. And thereupon the said parties were fully heard by their respective witnesses and counsel; and the arbitrators having carefully considered the matters submitted to them, and the allegations and proofs of the respective parties, do award and determine of and concerning the premises, and this is our final award and determination, to wit:

1st. A majority of the said arbitrators, viz., Messrs. Curtis, Paige, and Child, do award and determine that if the United States shall adopt and decide to execute the plan of operations designated in the specification and on the plat as Dam B, being the second plan of operations named in the said specification, then the said Great Falls Manufacturing Company are legally entitled to the sum of fifty thousand ($50,000) dollars as compensation for the use and occupation by the United States of the land, water-rights, and privileges claimed by the said company, and all consequential damages to the property and rights of the said company which they may legally claim by reason of the execution by the United States of the plan of operations last above-mentioned.

2d. The same arbitrators last above-mentioned do award and determine that if the United States shall adopt and decide to execute the plan of operations designated in the specification and on the plat as Dam A, being the first plan of operations mentioned in the said specification, then the Great Falls Manufacturing Company are legally entitled to the sum of sixty-three thousand seven hundred

Appendix.

and sixty-six ($63,766) dollars as compensation for the use and occupation by the United States of the land, water-rights, and privileges claimed by the said company, and all consequential damages to the property and rights of the said company which they may legally claim by reason of the execution by the United States of the plan of operations last above-mentioned. But this assessment is based upon the condition that the said company, as against the United States, may lawfully build and maintain a canal and bulkhead across and upon the land of the United States, on the Virginia shore of the Potomac, since marked on the said plat numbered 4 as belonging to the United States, so as to use the water of the pool above the Dam A, subject to the superior right of the United States to use the water for the aqueduct in the manner and to the extent shown by the aforesaid specification of the said Dam A, and its corresponding plan of operations.

3d. The same arbitration last above-mentioned do award and determine that if the United States shall adopt and decide to execute the plan of operations designated in the specification and on the plat as Dam C, being the third plan of operations named in the said specification, then the said Great Falls Manufacturing Company are legally entitled to the sum of seventy-seven thousand two hundred ($77,200) dollars as compensation for the use and occupation by the United States of said land, water-rights, and privileges claimed by the said company, and all consequential damages to the property and rights of the said company, which they may legally claim by reason of the execution by the United States of the plans of operations last above-mentioned. But this assessment is based upon the condition that the said company, as against the United States, may lawfully build and maintain a canal upon and across the land of the United States, on the Virginia shore of the Potomac river, marked on the said plat numbered 4 as land of the United States, so as to use the water of the pool above the Dam C, subject to the superior right of the Untied States to use the water of the aqueduct in the manner and to the extent shown by the aforesaid written specification of the said Dam C, and its corresponding plan of operations.

4th. The undersigned arbitrators do award and determine that if the United States shall adopt and decide to execute the plan of operations designated in the specification and on the plat as "Plan 4th," being the fourth plan of operations named in the said specification, then the said Great Falls Manufacturing Company are legally entitled to the sum of fifteen thousand six hundred and ninety-two ($15,692) dollars as compensation for the use and occupation by the United States of the land, water-rates, and privileges claimed by the said company, and all consequential damages to the property and rights of the said company which they may legally claim by reason of the execution by the United States of the plan of operations last above-mentioned.

The undersigned, Jesse L. Williams and Joseph R. Swan, are of opinion that the above awards of the majority of the arbitrators as compensation and damages to the claimants on account of the said dam, etc., B, A, and C, are, respectively, too much, and they do not agree to said awards, but they concur in the award relating to said Plan 4th as, comparatively, the least objectionable.

5th. The undersigned arbitrators do award and determine that the United States shall pay the costs and expenses of this arbitration, consisting of the compensation and expenses of the arbitrators, taxed at the sum of twelve thousand ($12,000) dollars, and the cost of depositions, witness fees, and other incidental expenses, taxed at the sum of seven hundred and sixty-one ($761.64) dollars and sixty-four cents, amounting in the whole to the sum of twelve thousand seven hundred and sixty-one ($12,761.64) dollars and sixty-four cents. The deposition and a transcript of the oral evidence laid before the arbitrators are returned with this award.

Dated at Boston this twenty-eighth day of February, A.D. one thousand eight hundred and sixty-three.

B. R. CURTIS,
A. C. PAIGE,
LINUS CHILD,
JESSE L. WILLIAMS,
J. R. SWAN.

Memorandum of Costs.

Commissioner, for depositions in Boston and vicinity, and travelling to and attendance at Washington	$227 00
Travel and attendance of witnesses, as per certificate of February 6th, at four cents per mile and $1.25 per day	192 84
Ditto, McElroy, at Boston	12 00
Allowance to Noyes, as certified by counsel of both parties	30 00
Commissioner in Washington, as per his statement, assented to by counsel	250 00
	$761 84

The compensation of the persons named in said agreement was paid, by order of the Secretary of the Interior contained in the following letter; and an account for such compensation was made out in favor of each of said parties, and a receipt therefor signed by him, in the form of that in this finding set forth immediately after said letter:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D.C., December 15, 1864.

SIR:—You are hereby authorized and requested to pay to the Hon. Benjamin R. Curtis, of Boston, the sum of two thousand five hundred dollars ($2,500); to Jesse L. Williams, of Fort Wayne, Indiana, the sum of two thousand five hundred dollars ($2,500); to A. C. Paige, Esq., of Schenectady, New York, the sum of two thousand five hundred dollars ($2,500); to Linus Child, of Boston, two thousand five hundred dollars ($2,500); and to J. R. Swan, of Columbus, Ohio, the sum of two thousand dollars ($2,000), making in all $12,000, being the sums charged by and awarded to them respectively, and in gross, as compensation for their services as arbitrators in the controversy between the United States and the Great Falls Manufacturing Company, and charge the same to the appropriations for the completion of the Washington Aqueduct.

. . . . . .

I am, sir, very respectfully, your ob'd't servant,
J. P. USHER, *Secretary.*

CLEMENT L. WEST, *Esq.*
Disbursing Agent Washington Aqueduct, Washington City.

For the Washington Aqueduct.

The United States to Benjamin R. Curtis, Dr.

Dec. 20, 1864.	For professional services as arbitrator in the controversy between the United States and The Great Falls Manufacturing Company, two thousand five hundred dollars,	$2,500 00

Received Washington, D.C., the 20th day of December, 1864, from C. L. West, disbursing agent, the sum of two thousand five hundred dollars cents in full payment of the above account.
(Signed duplicates.)

B. R. CURTIS.

$2,500 00.

The cost and expenses incurred by the parties named in said agreement, as above stated, were paid by the order of the Secretary of the Interior out of the same appropriation as that named in the letter set forth in this finding.

Appendix.

XIV.

The specifications of the proposed plan of operations referred to in the report as "No. 3, B.R.C.," are as follows; but no map or plat called for therein appeared before the court; but it appears that they have been lost:

No. 3, B.R.C.

Alternative plans proposed for the Potomac dam of the Washington Aqueduct.

1. Marked A on the map: Beginning at the present feeder of the aqueduct, crossing Conn's Island, and striking the Virginia bank on the land belonging to the United States.

The portion extending from the Maryland bank to Conn's Island to be built of masonry, of the section shown by the annexed profile. The style of workmanship as described for the second plan (B). The remainder of the dam to be made of riprap, as described in the first eight paragraphs of the accompanying printed specification. The crest to be finished to the uniform level of 150 feet above tide.

With this plan and the next succeeding the right is required to deepen the channel on the Maryland side of Conn's Island, so as to obtain a supply of 42,000,000 gallons per day at low stages of the river, with the water surface six inches above the centre (grade) of conduit, or 147 feet above tide.

2d. Plan marked B, to extend from the Maryland shore to the Virginia side, near to and below the head of the old canal, as marked upon the map, and to the height of 150 feet above tide. To be constructed of masonry throughout, and of the section shown by the accompanying profile. The face and coping to be of the best quality of Seneca sandstone, and the rubble lacking of the same, or of blue gneiss. To be carefully bedded on tight, solid rock; beds and end joints for front and rear stones to be cut in the rock. The face of large stones, well bonded and cut to lay a quarter of an inch joint, their faces pointed off within drafts. Coping to be full to dimensions on all sides, with fine joints, its upper surface and front hammered smooth. The backing of the best rubble masonry, all to be laid in cement mortar. The coping and the course below it to be secured with iron dowels. To be backed up with gravel, the upper surface of which will slope one foot in four to the bottom of the river. A good paving extending back 18 feet, to be laid on the gravelling. The government, in further amendment and modification of dam B, proposes to construct from the abutment on the Virginia shore, across the company's canal, and near its mouth, to the high ground, a guard bank, the top of which shall be 163.30 feet above tide, to be connected by masonry with the said abutment. The bank to be constructed of earth, ten feet wide at the top, with slopes of one and a half to one; protected on the up-stream side by a riprap and slope wall three feet thick at the top and four feet at the base, to go down to the rock, and the lower part to be laid in cement to the height of 151 feet above tide; the foot to be connected with the rock; a puddle wall rising as high as the flow line through the centre of the bank. The company to have the privilege of connecting a bulkhead with the said guard wall, at such time and place and of such dimensions as they may deem proper.

3d. Plan C. A wall of rubble masonry in cement mortar, beginning at the present feeder of the aqueduct, to extend up the Maryland channel to a ledge of rocks above Conn's Island; thence by a riprap dam to cross the river, as shown by the line C on the plat. The crest to be 150 feet above tide.

Plan 4th. The dam to extend to Conn's Island, and so far on the same as may be necessary for a secure abutment on the same line of direction as in B, and to be constructed of masonry, as specified in the second plan. The crest to be 148 feet above tide. With this plan the United States require the right to deepen the channels on the Maryland side of Conn's Island near its head, so as to draw off not less than 42,000,000 gallons per day, when the surface of the water in the river at the head of Conn's Island stands at 147 feet above tide.

Appendix.

The maximum quantity of water to be taken from the river for the supply of the aqueduct will be 70,000,000 gallons per day.

[Struck out this 18th of February, 1863, and "A" inserted.

J. H. B.]

(A. The maximum quantity of water to be taken from the river for the supply of the aqueduct will be whatever the dams, respectively, may yield, and is not limited to 70,000,000 gallons per day.)

On its entrance into the aqueduct, the water will pass through the feeder (plan herewith) to the gate-house, where it will change its direction ninety degrees, pass through the gates, shown on the drawing, through the "rock cut" and tunnel No. 1 to waste weir No. 1.

In compliance with the conditions imposed by the Chesapeake and Ohio Canal Company, acting under authority from the State of Maryland, this portion of the work has been made of larger dimensions than the remainder, so as to serve as a feeder to the canal. The distance is eighteen hundred and eighty (1,880) feet. The sections of rock, cut, and tunnel, are shown herewith. From waste weir No. 1 to the receiving reservoir the conduit is generally a circle of nine feet interior diameter, some short portions being 9′ 9″ diameter. The distance is 47.917.5 feet. The fall of the conduit in this distance is 7′ 2″ feet.

XV.

The claimants presented to the referees, proofs, title-deeds, etc., showing a valid title in it to the Toulson tract, Conn's Island, and the Cyclades. Objections to the title were presented and urged on behalf of the United States, and the referees decided that the title was valid and satisfactory. No other title to the tracts than the title of the claimants is asserted.

XVI.

The conduit through which the water supply of the City of Washington is drawn was completed on the 5th of December, 1863.

XVII.

On the 4th of July, 1864, Congress enacted that the sum of $150,000 be appropriated for the purpose of constructing the dam of solid masonry across the Maryland branch of the Potomac river, near the Great Falls, and for other purposes.

XVIII.

On the 30th of July, 1864, the United States entered into a contract for the construction of a dam for the supply of the aqueduct, and proceeded to construct such dam, and to take possession of so much of Conn's Island as was required for the purpose of securing the dam and making a permanent abutment for it.

The dam extends from a point on the Maryland shore, just below the feeder or mouth of the aqueduct, across the channel between Falls Island and the Maryland shore; across the head of Falls Island (which is under water, except at very low stages), and thence across the channel between Falls Island and Conn's Island to its abutment on Conn's

Appendix.

Island, at a point 770 feet above the foot of Conn's Island — closing the Maryland channel of the river entirely across — its length being about 1,176 feet.

The height of the dam is 148⅓ feet above mean tide at Washington. Seventy feet of the dam next to the Maryland shore is one foot higher. It is about 8.4 feet above the bed of the river in the Maryland channel.

XIX.

The dam is constructed from the Maryland shore to Conn's Island of the same, or about the same, height as the dam contemplated by Plan 4 in the paper set forth in finding XIV. as "No. 3, B.R.C."; and, although of a different length and a different line of direction from that contemplated by Plan 4, in its effect produces the same results contemplated by Plan 4, and, so far as shown, with the same benefit to the United States, and with no greater loss and injury to the claimants than would have been produced if Plan 4 had been followed; and it was constructed substantially in conformity with the fourth of the alternative plans presented by the United States to the said referees.

XX.

At the Maryland termination of the dam is the feeder entrance, having a diameter of 10 feet, and an elevation above mean tide of 139 and 149 feet.

From the feeder to the receiving reservoir, a distance of 12 miles, the water passes through several tunnels and through a cemented conduit. These tunnels are six in number, aggregating in length 4,522 feet, and having a rough interior, constructed so as to admit a circle of 11 feet in diameter.

The dimensions of the outer portion of the conduit are 9 feet, and for some short distance 9 feet 9 inches, with a fall of 9½ inches to the mile. The elevation at the entrance to the receiving reservoir is 143.77 feet and 134.77 feet.

The receiving reservoir is connected with the distributing reservoir by a conduit 2 miles long, having an interior diameter of 9 feet at the exit from the receiving reservoir; the height is 143.39 feet and 134.39 feet. At the entrance to the distributing reservoir the height is 141.868 feet and 132.868 feet.

From this distributing reservoir, which is two miles above Rock Creek, the water is carried to the city by three iron mains, whose maximum aggregate capacity is 31,000,000 gallons in twenty-four hours, being, respectively, 36, 30, and 12 inches in diameter.

XXI.

The dam was completed to its present height in December, 1867, and since then the water drawn through the aqueduct for the use of the cities of Washington and Georgetown has been from 12,000,000 to 24,000,000 gallons daily.

For the purpose of drawing the water into the aqueduct, it is necessary that a pool or basin be formed in the river by means of a dam or similar structure.

Conn's Island, in connection with the Maryland shore and the dam, forms such a basin as is necessary for the purpose of supplying the aqueduct, having its upper end open to receive the flow of the water, as it may be needed. At low stages of the water, wing dams have been thrown out from the head of Conn's Island, and other contrivances used, to increase the flow of water into this basin as it has been needed.

Falls Island could not be utilized for this purpose, for the reason that there would not be a sufficient flow of water between it and the Maryland shore, and for other reasons, such as insufficient height, etc.

There is no other island or natural formation which could be utilized for forming a suitable basin, without carrying the aqueduct much further up the river. So that, if Conn's Island was not used, it would be necessary to carry the dam across to the Virginia shore, either above or below the island, or to build some artificial structure, such as a wing dam, to take the place of the island.

XXII.

If the dam were carried across the river at Conn's Island it would be in the rapids and in deeper water, and its construction would be much more difficult and expensive.

If the dam were carried across the river above the island it would involve the expense of a longer conduit, and the increased expense of building the dam entirely across the river, or building a wing dam as a substitute for the island to form a pool.

The cost of the present dam is $77.250.

The cost of the aqueduct is $3,793,020. Its length is 60,952 feet.

The uses of the aqueduct require the entire flow of the water in the Maryland channel, in the low stages of the river.

XXIII.

The water drawn through the aqueduct is distributed in the cities of Washington and Georgetown, for the use of the United States Government in its buildings, navy-yard, fountains, etc., and for the municipal and domestic uses of the said cities and their inhabitants.

The value of the water for the uses to which this is applied is derived from its elevation, which will admit of its flow or descent through the city; and when found at sufficient elevation to admit of being distributed by its natural flow, it possesses a great value, and is paid for by cities when taken from the control of private owners, according to its value, depending, as before said, upon its elevation.

Having built that part of the dam above set forth, the United States refused to carry out said award, save as to the part relating to the costs of the arbitration; thereupon plaintiff commenced its suit in the

Appendix.

Court of Claims for compensation for its lands and water-rights taken by the United States in constructing and using said dam, and the Court, at its December Term of 1880, found that the taking was substantially that specified in said award as Plan 4, and gave judgment for the exact compensation, to a cent, awarded by said arbitration in case the United States should adopt Plan 4. 16 Court of Claims, 160. *Ib.*, 112 U.S. R., 465.

Section 1057 of the U.S. Rev. Sts. reads as follows: —

"On the first day of every December Session of Congress, the Clerk of the Court of Claims shall transmit to Congress a full and complete statement of all the judgments rendered by the Court during the previous year, stating the amounts thereof, and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered." . . .

Said judgment was rendered in 1881. It was reported, under the law last above quoted, to the Congress which commenced its session in December, 1881, at which the Act of July 15, 1882, was passed, authorizing the completion and extension of the dam, adopting, by legislative action, plan of dam A of said submission and award.

On the 21st day of August, 1883, the then Attorney-General of the United States published an advertisement, of which the following is a copy: —

CONDEMNATION OF LAND FOR WATER SUPPLY.

WASHINGTON, D.C.,
DEPARTMENT OF JUSTICE,
August 21, 1883.

Whereas, by Section 1 of the Act of 1882, Chapter 294 (July 15), entitled — "An Act to increase the water supply of the City of Washington, and for other purposes," it is, among other things, provided —

"That the Secretary of War shall cause to be made a survey and map of the land necessary to extend the Washington Aqueduct from its present eastern terminus to the high ground north of Washington, near 6th street extended, and of the land necessary for a reservoir at that point, the capacity of which shall not be less than three hundred million gallons; and a like survey and map of the land necessary for a dam across the Potomac river at the Great Falls, including the land now occupied by the dam, and the land required for the extension of said dam across Conn's Island to and upon the Virginia shore; and when surveys and maps shall have been made, the Secretary of War and the Attorney-General of the United States shall proceed to acquire to and for the United States the outstanding title, if any, to said land and water rights, and to the land on which the gate-house at Great Falls, by condemnation."

And also that —

"When the map and survey are completed, the Attorney-General shall proceed to ascertain the owners or claimants of the premises embraced in the survey, and shall cause to be published, for the space of thirty days, in one or more of the daily newspapers published in the District of Columbia, a description of the entire tract or tracts of land embraced in the survey, with a notice that the same has been taken for the uses mentioned in this act, and notifying all claimants to any portion of said premises to file, within its period of publication, in the Department of Justice, a description of the tract or parcel claimed, and a statement of its value as estimated by the claimant."

All of which will better appear upon reference to such act.

And whereas such map and survey have been completed:

Appendix.

Now, therefore, in accordance therewith, and under the above requirements, I hereby give notice that the several parcels of land and water rights below described have been taken for the uses above indicated, viz.:

(*a.*) FOR EXTENSION OF AQUEDUCT.

First. It is proposed to take a right of way for a tunnel, whose least depth below the surface of the ground will vary from 50 to 170 feet, as shown in detail by the longitudinal section on tracing A; the line of tunnel commences at the auxiliary gate-house of the distributing reservoir; thence north 81 degrees 40 minutes 22 seconds east 20,826 feet to its eastern limit at the site of the proposed reservoir east of Howard University.

Second. It is proposed to take and acquire title to the following tracts of land at the sites of the several shafts, viz.:

At *Foundry Branch*, working shaft, about three (3) acres, more or less, located in the valley of Foundry Branch south of, and fronting on, the "New Cut" road.

At *Fayette Street*, air-shaft, a lot 50 × 100, fronting on Fayette street.

At *Rock Creek*, working shaft, about two and one-half (2½) acres on the left bank of the creek, extending about 1,000 feet down stream from the lower mill dam, and bounded on the east by the mill race.

At an *Air Shaft*, located about 1,400 feet west of the Columbia road, on tunnel line, a lot comprising about 5,000 square feet, more or less, and a right of way for a road 30 feet wide, leading from the nearest public thoroughfare to said lot.

At *Champlain Avenue*, working shaft, a lot fronting on Champlain avenue, and comprising 40,000 square feet, more or less.

A roadway, 60 feet wide, and about 1,350 feet long, from the auxiliary gate-house at the distributing reservoir, to the intersection of the Foxhall lane and New Cut roads.

The several parcels of land referred to above are indicated by the spaces inclosed in green on tracing A. Their exact boundaries are not specified, because they can be modified within certain limits with a view to conforming, as far as practicable, to the wishes of the property owners.

(*b*) FOR RESERVOIR NEAR HOWARD UNIVERSITY.

1st. It is proposed to take and acquire title to about 67 8-10 acres of land lying in the depression east of Howard University, together with all improvements thereon, comprising property in Howard subdivision, and undivided property, as follows: Blocks 9, 10, 11, 22, 23, 24, 25, 26, with adjoining streets, and Lots A, B, C, D, E, F, and Lots 10 to 21 inclusive, all in block 16, together with that part of College street adjoining lots 10 to C, inclusive, in said block; also the Spring Lot belonging to the United States, containing about 4-10 acres; also about 24 4-10 acres of undivided land, said to belong to the Howard University, 6-10 acres said to belong to the Soldiers' Home, and 20 3-10 acres said to belong to G. E. Moore. Also a Lot,* 20 feet square, in the south-west corner of Gen. Whittlesey's property.

2d. It is also proposed to take a right of way, 50 feet wide, and for such length as may be needed, to extend 4½ street (so called) from boundary to and upon the property to be taken for the reservoir.

It is proposed to lay the large reinforcing mains along this line; the right of way through LeDroit Park has been promised in writing, free of cost, and it already exists as a public street from there to the Howard University grounds. This will leave a length of about 360 feet to be condemned.

The lands referred to under this heading are shown on tracing B, indicated by the parts colored in green.

---

*This lot is required for the construction of the valve-centre chamber.

(*c.*) LAND FOR DAM, ETC., AT GREAT FALLS.

1st. For extending the dam to and upon the Virginia shore, it is proposed to take and acquire title to a strip about 918 feet wide, crossing Conn's Island and the Virginia channel, and connecting the U.S. property on Fall's Island and Hard-to-come-at, with the U.S. property on the Virginia shore. This will extend the present limits of the U.S. property on the Virginia shore to the south, by taking in a triangular lot containing about 8-10 acres.

This tract is colored in yellow on tracing C.

2d. It is proposed to hold and acquire title to the lot on which the gate-house at the Great Falls now stands, containing about one-fifth of an acre.

This tract is colored in brown on tracing C.

It is proposed to take and acquire title to a tract connecting the gate-house lot with the U.S. property on Falls Island, containing about 2 6-10 acres. The influent conduit and a part of the dam are located on this tract, and the Chesapeake & Ohio canal passes through it. It is colored in green on tracing C.

4th. In addition to acquiring to and for the U.S. any outstanding title to these lands at the Great Falls, it is also proposed to acquire all water rights implied in the possession of the same, or needed for purposes contemplated by the act under which these proceedings are taken.

The map of the surveys (in three tracings) required for the uses enumerated in the above-named act of 1882, ch. 294, may be seen at this Department by all claimants to any portion of said premises, and *they are hereby respectively notified to file within the period of the publication of this advertisement, in the Department of Justice, a description of the tracts or parcels respectively by them claimed, and a statement of their value as by each claimant estimated.*

BENJAMIN HARRIS BREWSTER,
Attorney-General.

RIGHT OF TRIAL BY JURY.

To what extent the Constitutions of the thirteen States existing at the time of the adoption of the United States Constitution, or made about that time, "*preserved*" to their citizens the right of trial by jury in cases at law, is shown by the extracts following: —

Connecticut Constitution, 1818, Section 21.

The right of trial by jury shall remain inviolate.

Delaware Constitution, 1792, Section 7.

Nor shall be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land.

Georgia Constitution, 1789, Article 4, Section 3.

Same as Connecticut.

Maryland Constitution, 1776, Section 21.

No freeman ought to be . . . deprived of his life, liberty, or property but by the judgment of his peers or by the law of the land.

Massachusetts Constitution, 1780, Article 12.

No subject shall be . . . deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

New Hampshire Constitution, 1792, Article 20.

In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practised, the parties have a right to trial by jury.

New Jersey Constitution, 1776, Section 22.

The inestimable right of trial by jury shall remain confirmed as a part of the law of this colony forever.

New York Constitution, 1777, Section 13.

No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to the subjects of this State, by this Constitution, unless by the law of the land, or the judgment of his peers.

North Carolina Declaration of Rights, 1776, Article 14.

That in all controversies at law, respecting property, the ancient mode of trial by jury is one of the best securities of the right of the people and ought to remain sacred and inviolable.

This was made part of the Constitution of 1776, by Article 44 of the same.

Pennsylvania Constitution, 1683, Section 8.

That all trials shall be by twelve men.

In the Constitution of 1776, Article 25, the above is embodied in the following words: —

Trials shall be by jury as heretofore.

Rhode Island Constitution, 1842,[1] Article 15.

The right of trial by jury shall remain inviolate.

South Carolina Constitution, 1790, Article 6.

The trial by jury as heretofore used in this State shall be forever inviolably preserved.

Virginia Constitution, 1776, Section 11.

That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

It will be seen that Connecticut made no provision for "preserving" the right of trial by jury until 1818, and that Rhode Island did not until 1842; still it is a matter of history that these two States had

[1] Rhode Island lived until that time under a charter of Charles II. She did not ratify the Constitution until May 20, 1790; and the ten amendments had already been proposed in the First Congress, September 25, 1789.

Appendix.

not only preserved the right in practice, but had extended it farther than any other English-speaking community.

Federalist, No. 83.

The statutes of many of the thirteen States have been examined, but not all of them, for want of time, without finding a single instance of an act having been passed at or near the period of the adoption of the Constitution of the United States, for taking private property for public use, wherein the State did not make provision, directly or indirectly, for the assessment of the value of the property taken, by a jury.

In trial of case, of taking the present dam at Great Falls, counsel for the United States said: "I have failed to discover any act of any legislature which provides for the assessment of damages in a case like this other than upon the ground."

EXTRACTS FROM THE STATUTES OF ORGANIZATION AND APPROPRIATIONS TO PAY JUDGMENTS OF THE COURT OF CLAIMS FROM 1863 TO 1887.

At first, as is well known, that Court made no adjudication, and reported its findings to Congress only. But by Chapter 92, Statutes at Large, 1863, "An Act to establish a Court for the '*investigation*' of claims against the United States" was amended and revised. By that Act was added to its investigations, set-offs and counter claims by the government by persons bringing claims against the government, and that claim of counter-claim was to be enforced in the District Court. By section 7, in case of final judgment in said Court in favor of a claimant "the sum due thereby shall be paid out of any *general* appropriation made by law for the payment and satisfaction of private claims on presentation of the Secretary of the Treasury of a copy of said judgment, certified by the Clerk of said Court of Claims, and signed by the Chief Justice, or in his absence by the presiding judge of said Court."

No other provision is made in said Act for payment of claims or for any appropriation, but Section 14 of said Act enacts that no money shall be paid out of the Treasury for any claim passed upon by the Court of Claims until after an appropriation therefor shall be estimated for by the Secretary of the Treasury. This Act was approved March 3, 1863.

No such appropriations were made for the fiscal years ending June 30, 1863, and June 30, 1864; but by Chapter 147, an Act making appropriations for the Legislative, Executive, and Judicial expenses of the Government for the year ending June 30, 1865, and for other purposes, the following appropriation was made: "For payments of

judgments *to be* rendered by the Court of Claims previous to the 30th of June, 1865, three hundred thousand dollars."

See 13 Stat. at Large, p. 148.

In the year 1865 no appropriation was made for the payment of claims; but previous to March 17, 1866, the Supreme Judicial Court had taken into consideration the Court of Claims, and had determined not to hear appeals therefrom under the Act of 1863, hereinbefore cited, because among other things of the provisions of the 14th section of said Act, "that no money shall be paid out of the Treasury for any claim passed upon by the Court of Claims till after an appropriation therefor shall be estimated therefor by the Secretary of the Treasury.

On said March 17, 1866, Congress repealed said 14th section of the Act of 1863, and provided anew for a final judgment and decree in all cases heretofore decided in the Court of Claims of the character mentioned in the said Act, and with certain other exceptions, but further provided: "That at the end of every term of the Court of Claims the Clerk of said Court transmits a copy of the decisions thereof to the heads of departments; to the Solicitor, Comptroller, and Auditor of the Treasury; to the Commissioners of the General Land Office and of Indian Affairs; to the Chiefs of Bureaus, and to other officers charged with adjusting claims against the United States.

14 Stat. at Large, p. 9.

By the General Appropriation Bill of 1886, the following was enated: —

"For payment of judgments rendered by the Court of Claims in favor of claimants, in addition to the unexpended balance of the appropriation for the fiscal year ending June 30, 1865, five hundred thousand dollars; provided that judgments already rendered may be paid out of this appropriation at any time after the passage of this Act."

14 Stat. at Large, p. 194.

By the General Appropriation Bill of 1867, the following was enacted: —

"For payments of judgments which may be rendered by the Court in favor of claimants, ten hundred thousand dollars."

14 Stat. at Large, p. 444.

Inadequate sums, in the same words, of appropriations were made in the General Appropriation Bill, to wit, the Legislative, Executive, and Judicial, until the year 1876, when new appropriations were made for the payment of judgments rendered by the Court of Claims. In 1877 an appropriation was made for the payment of judgments of the Court of Claims, naming each individual.

By the General Appropriation Bill of 1868, the following was enacted: —

Appendix.

"For payment of judgments which may be rendered by the Court in favor of claimants, one hundred thousand dollars."

15 Stat. at Large, p. 95.

By the General Appropriation Bill of 1869, the following was enated : —

"For payments of judgments which may be rendered by the Court in favor of claimants, one hundred thousand dollars."

15 Stat. at Large, p. 287.

By the General Appropriation Bill of 1870, the following was enacted : —

"For payment of judgments which may be rendered by the Court in favor of claimants, one hundred thousand dollars."

16 Stat. at Large, p. 235.

By the General Appropriation Bill of 1871, the following was enacted : —

"To pay judgments of the Court of Claims, five hundred thousand dollars."

16 Stat. at Large, p. 480.

By the General Appropriation Bill of 1872, the following was enacted : —

"To pay judgments in the Court of Claims, four hundred thousand dollars. Provided that no part of this sum shall be paid upon any judgment rendered in favor of George Chorpenning, growing out of any service rendered in carrying the mail."

17 Stat. at Large, p. 82.

By the General Appropriation Bill of 1873, the following was enacted : —

"To pay judgments of the Court of Claims, four hundred thousand dollars."

17 Stat. at Large, p. 508.

By the General Appropriation Bill of 1874, the following was enacted : —

"To pay judgments of the Court of Claims, one million dollars."

Stat. at Large, 1873–74, p. 108, Chap. 328.

By the General Appropriation Bill of 1875, the following was enacted : —

"To pay judgments of the Court of Claims, four hundred thousand dollars."

Stat. at Large, 1874–75, p. 369, Chap. 129.

In the year 1876 no appropriation was made for the payment of judgments rendered in the Court of Claims.

In 1877 the appropriation for the payment of judgments rendered in the Court of Claims appear individually in the Deficiency Bill.

Stat. at Large, 1876–77, p. 347, Chap. 105.

Again, in 1877, an appropriation is found in the Deficiency Bill to pay individually a large number of judgments, one of which in favor of Thomas Kelly had been delayed since 1870, and also an appropriation appears for payments with interest showing a very much delayed judgment.

Stat. at Large, 1877–78, pp. 7 and 8, Chap. 3.

Again, in 1878, an appropriation appears in the Deficiency Bill for the payments of judgments rendered in the Court of Claims containing a large number of individual cases with delayed interest due and unpaid.

"In all five hundred thousand seven hundred and ten dollars and twelve cents, and such sum as may be necessary for interest and premium."

Stat. at Large, 1877–78, p. 116, Chap. 191.

Again, in 1878, under an act making appropriations for sundry civil expenses of the Government, and for other purposes, an appropriation appears for the payment of judgments rendered in the Court of Claims, each judgment being appropriated for individually, with interest at five per cent.

Stat. at Large, 1877–78, p. 234, Chap. 359.

During this year there were appropriations for a large number of persons individually, but no General Appropriation Bill for judgments rendered, and the following was enacted: —

"That so much of Section 5 of the Act approved June 20, 1874, as directs the Secretary of the Treasury at the beginning of each session to report to Congress with his annual estimates any balances of appropriations for specific objects affected by said section that may need to be reappropriated be and hereby is repealed. And it shall be the duty of the several accounting officers of the Treasury to continue to receive, examine, and consider the "justice and validity" of all claims under appropriations, the balances of which have been exhausted or carried to the surplus fund under the provisions of said section, that may be brought before them within a period of *five* years. And the Secretary of the Treasury shall report the amount due each claimant at the commencement of each session to the Speaker of the House of Representatives, who shall lay the same before Congress for consideration; *provided*, that nothing in this Act shall be construed to authorize the reëxamination and payment of any claim or account which has been once examined and rejected unless reopened in accordance with existing law.

Approved June 14, 1878.

Stat. at Large, 1877–78, p. 130, Ch. 191.

Appendix.

In 1879 the appropriation for the payment of judgments rendered in the Court of Claims is found in the General Appropriation Bill.

Whenever before this there has been a General Appropriation Bill for the payment of judgments, it was always put in the Legislative and Executive Appropriation Bill, which was a bill which never failed, because the Government is stopped unless it is passed or the appropriation continued. We have already seen that a special appropriation had got into the Deficiency Bill. In 1879 (Chapter 182), there is an appropriation for payment of judgments of the Court of Claims. This is not in a General Appropriation Bill, but finds itself in the Sundry Civil Service Bill in that year for the first time.

Stat. at Large, p. 397, Ch. 182.

Again, in the year 1879, an appropriation for payment of judgments of the United States Court of Claims is found in the Deficiency Bill for that year in which the judgments are rendered *individually*.

Stat. at Large, 1878–79, p. 411, Ch. 183.

In 1880, the appropriation is again found in the Deficiency Bill: —

"For payment of judgments of the United States Court of Claims, one hundred and eighty-five thousand eight hundred and three dollars and fifty-four cents, or so much thereof as may be necessary, provided that no judgment shall be paid until the right of appeal has expired."

Stat. at Large, 1879–80, p. 252, Ch. 234.

In the year 1881, the appropriation appears in the Deficiency Bill as follows: —

"To pay judgments of the United States Court of Claims, four hundred and fifty thousand dollars, or so much thereof as may be necessary, provided that no judgment shall be paid until the right of appeal has expired, provided that this appropriation shall be applied only to the claimants of judgments of the Court of Claims on appeal or to judgments entered in accordance with mandates for the Supreme Court where such mandates had been issued prior to the passage of this Act."

Stat. at Large, 1880–81, p. 415, Ch. 132.

In the year 1882 the appropriation again appears in the Deficiency Bill passed August 5, to pay the judgments of the United States Court of Claims as follows: —

"To pay judgments of the United States Court of Claims, three hundred and forty thousand nine hundred and thirty-eight dollars, or so much thereof as shall be necessary, provided that no judgment shall be paid until the right of appeal has expired."

Stat. at Large, 1881–82, p. 258, Ch. 390.

In 1883 the appropriation is found in the Deficiency Bill as follows: —

"For payment of the judgments of the Court of Claims, three hun-

dred and thirty-nine thousand dollars, provided that no judgment shall be paid until the right of appeal has expired."

Stat. at Large, 1882–83, p. 587, Ch. 141.

In this year the powers of the Court of Claims were extended by an Act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims against the Government, Approved March 3, 1883.

Stat. at Large, 1882–83, p. 485, Ch. 116.

In 1884 the appropriation again appears in the Deficiency Bill for payment of judgments rendered by the Court of Claims. There are seventy-four separate individual judgments therein provided for, for *which the sum* of two hundred and fifty thousand three hundred and thirty-three dollars and twenty-nine cents, and a sufficient sum, in addition thereto, as may be necessary to pay the interest on the judgments in favor of certain parties therein named, "provided that none of the aforesaid judgments shall be paid until the right of appeal has expired."

Stat. at Large, 1883–84, p. 240, Ch. 334.

In the year 1885 the appropriation is again found in the Deficiency Bill. Therein are given *eighty* different individual judgments rendered by the Court of Claims, to the payment of which two hundred and thirty-eight thousand four hundred and eighty-five dollars and nine cents are appropriated, "provided that none of the aforesaid judgments shall be paid until the right of appeal shall have expired."

Stat. at Large, 1884–85, p. 452, Ch. 359.

In the years 1886 and 1887 there appears to be no appropriation for the payment of judgments rendered by the Court of Claims.

AN ACT TO AUTHORIZE THE CORPORATION OF GEORGETOWN IN THE DISTRICT OF COLUMBIA TO LAY AND COLLECT A WATER-TAX, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Mayor, Recorder, Aldermen, and Common Council of Georgetown, in the District of Columbia, shall have full power and authority to levy and collect a tax, not exceeding sixty cents per front foot, on all lots and parts of lots within said corporate limits, in front of or parallel to which water-mains have been or may hereafter be laid; or, in their discretion, to appropriate from the corporate funds generally so much money as may be necessary to supply the inhabitants of said town with Potomac water from the aqueduct, mains, or pipes now laid or to be laid in the streets of said town by the United States; and to make all laws and regulations for the proper distribution of the same, subject to the restrictions prescribed by this act, and the act approved March third, eighteen hundred and fifty-nine, and entitled "An act to pro-

Appendix.

vide for the care and preservation of the works constructed by the United States for bringing the Potomac water into the cities of Washington and Georgetown, for the supply of said water for all government purposes, and for the uses and benefit of the inhabitants of said cities."

SECT. 2. And be it further enacted, That said corporation shall have full power and authority to collect such taxes, when so fixed, in advance or otherwise, through such agents, collectors, or commissioners as they may designate and appoint; and upon the failure of any owner of said lot or lots, or part thereof, to pay said taxes, to sell the same; or to stop the supply of water to the same, or to distrain and sell the personal effects of such owner, and in the case of any sale the same proceedings shall be observed as are adopted in enforcing the collection of the general tax of said town; and generally to enact such laws as may be necessary to furnish the inhabitants of said town with pure and wholesome water, and to carry into complete effect the powers herein granted: Provided that the taxes levied by virtue of this Act shall never be a source of revenue other than as a means of supplying said town with water.

SECT. 3. And be it further enacted, That in levying said front foot tax, said corporation shall, in all cases where a lot or lots, or part thereof, may be situated at the intersection of two streets and fronting on the same, so reduce and graduate the tax thereon as not to exceed in all a tax upon one hundred feet front; and shall, in all cases where said property may have a front on any one or more streets of more than one hundred feet, so reduce and graduate the tax thereon as not to exceed a tax upon one hundred feet front.

SECT. 4. And be it further enacted, That all ordinances and resolutions, or parts thereof, relating to the distribution of Potomac water through said town, and the collection of a water tax, and the ordinances and resolutions heretofore passed by said corporation particularly mentioned in this section, be, and the same are, hereby ratified and confirmed, and said ordinances and resolutions being described and identified as follows, to wit: —

[Titles of ordinances and resolutions omitted.]

SECT. 5. And be it further enacted, That in case of a failure to pay any taxes whatever laid by said corporation by virtue of its vested powers, it shall be lawful to sell, in the discretion of the collector or other proper officer, either the real or personal estate, or both, of the delinquent tax-payer; and so much of the eighth section of the act approved May the twenty-sixth, eighteen hundred and twenty-four, entitled "An act supplementary to the act 'to incorporate the inhabitants of the city of Washington,' passed the fifteenth of May, one thousand eight hundred and twenty, and for other purposes," as in the following words, viz.: "Provided, That no sale of real estate shall be made but where the owner or tenant of the property has not sufficient personal estate out of which to enforce a collection of the debt due," be and the same is hereby repealed.

SECT. 6. And be it further enacted, That the person or persons appointed to collect any taxes imposed by said corporation, in pursuance of its vested powers, shall have authority to collect the same by distress and sale of goods and chattels of the person chargeable therewith, but no such sale shall be made unless ten days' previous notice thereof be given in some newspaper printed in the District of Columbia aforesaid; and the provisions of the acts of Maryland now in force within said District relating to the right of replevying personal property, taken in execution for public taxes, shall apply to all cases of personal property taken by distress to satisfy taxes imposed by virtue of the corporate powers aforesaid.

SECT. 7. And be it further enacted, That said corporation shall have power and authority to repair any of the footways of the streets in said town, and to impose and collect such tax or taxes on the lot or lots, or parts thereof, adjoining the same, as may be necesary to pay the expense of such repairs.

SECT. 8. And be it further enacted, That so much of the first section of the act approved May thirty-one, eighteen hundred and thirty, entitled "An act to amend the charter of Georgetown," as is in the following words, viz.: "Provided, That nothing in this act shall change the manner of giving notice of the sales of property owned by persons not residing in the District of Columbia," and the same is hereby repealed.

Approved, May 21, 1862.

An Act to provide for the care and preservation of the works constructed by the United States, for bringing the Potomac water into the cities of Washington and Georgetown for the supply of said water for all Government purposes, and for the uses and benefits of the inhabitants of the said cities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the dams, aqueducts, water-gates, reservoirs, and all fixtures and improvements connected therewith, which have been, or may hereafter be, constructed by the United States for the conveyance of the water from the Potomac river above the Great Falls thereof, to the cities of Washington and Georgetown, together with the land, houses, fencing-water, and other rights and appurtenances connected with the same, and belonging to the Government, as also the main conduits, supply pipes, basins, hydrants, fountains, stop-cocks, sewers, drains, receiving basins, and all other fixtures connected with the same, which have been, or may hereafter be, laid down or constructed by the United States, shall be placed by the President of the United States, under the immediate care, management, and superintendence of a properly qualified officer of the United States corps of engineers, to be appointed under him, who shall act under the Department of the Interior, and who shall make an

Appendix.

annual report to that department in the month of November in each year, to be laid before Congress at the commencement of their regular annual session, of the work, proceedings, repairs, casualities, and expenditures connected with said water-works for the preceding year; and such officer, as a compensation for the duties and responsibilities imposed upon him by this Act, shall receive, for his pay as said engineer, no more than his regular pay as an officer of the corps. He shall occupy the necessary apartments in one of the public buildings in the City of Washington, as may be directed by the President, and shall be supplied by the Government with the stationery, instruments, books, and furniture required in the performance of his public duties. And in this office of the Engineer of the Potomac Water-Works shall be kept and preserved a complete record of all the lands and other property and matters and things enumerated in this section, and otherwise connected with or belonging to these water-works, or which may hereafter be required or procured for the same. The said Engineer shall have full power and control over the said water-works, and shall regulate the manner in which the said corporations of Washington and Georgetown may tap the pipes for the supply thereof, and shall stop the same whenever it is found no more than adequate to meet the wants of the general government. The said engineer's decision on all questions connected therewith to be subject only to appeal to the Secretary of the Interior.

SECT. 2. *Be it further enacted*, That full power and authority are hereby given to the corporations of Washington and Georgetown, in the District of Columbia, to supply the inhabitants within their respective limits with Potomac water from the aqueduct, mains, or pipes now laid or to be laid in the streets and avenues by the United States; and to make all laws and regulations for the proper distribution of the same, subject to the restrictions prescribed by this Act; *Provided*, That no expense shall devolve upon the United States in consequence of said distribution.

SECT. 3. *And be it further enacted*, That the said corporations shall have authority, by ordinance, act, or otherwise, to establish a scale of annual rates for the supply and use of said water, apportioned to different classes of buildings in said city, according to their size, dimensions, assessed values, exposures to fires, uses for dwellings, stores, shops, stables, manufactories, or other purposes, number of occupants, or consumption of water, measured by meter or otherwise, and to modify, alter, amend, increase, or reduce such scale, from time to time, and extend it to other description of buildings and establishments; to collect such rates or rents, when so fixed, in advance or otherwise, through such agents or commissioners as they may authorize, from the owners or occupants of all such buildings or establishments, respectively, who may use the water therein; to stop the supply of water to any such dwelling or establishment upon a failure to pay said rate, charge, or rent; and, generally, to enact such laws as may be necessary to supply the inhabitants of said City of Washington with

pure and wholesome water, and to carry into full and complete effect the powers herein granted; *Provided*, That the rates levied by the cities of Georgetown and Washington shall never be a source of revenue other than as a means of keeping up to the said cities a supply of water.

SECT. 4. *And be it further enacted*, That for the purpose of enabling the corporations aforesaid to carry out the provisions of this Act, it shall be competent for them to borrow, in such proportions as they may deem expedient, a sum of money not exceeding $150,000 for the City of Washington, and $50,000 for Georgetown, redeemable within a period of ten years, out of any revenue to be derived from water-rents.

SECT. 5. *And be it further enacted*, That it shall not be lawful for any person or persons other than said corporations, or persons authorized by them, to tap or open the mains or pipes laid or to be laid by the United States for any purpose whatever, under a penalty of not less than $50 nor more than $500 for each and every offence. And if any person or persons shall wilfully and maliciously break, injure, deface, or destroy any main or pipe, bend, branch, valve, hydrant, service pipe, or any other fixture used for the distribution of water throughout the streets and avenues, or from its introduction into the houses, tenements, or buildings of said cities, such person or persons shall be subject to imprisonment in the county jail for a period not exceeding two years for each and every such offence.

SECT. 6. *And be it further enacted*, That whenever it shall become necessary to lay main pipes for the supply of water to the cities of Georgetown and Washington, the cost of the same shall be paid by the said cities, and the engineer aforesaid is hereby prohibited from making any contracts for the same, unless approved by the corporations aforesaid, and expressly stipulated with the contractor or contractors that the payment for the same is to be made by the said corporations; *Provided*, That no greater number of main pipes shall be laid by the General Government than are sufficient to give to said Government the necessary supply of water.

SECT. 7. *And be it further enacted*, That it shall be unlawful for any person or persons to do or commit any act by reason of which the supply of water, or any part thereof, shall become impure, filthy, or in any way unfit for use, and that any person or persons committing any such act or acts, wilfully, knowingly, and maliciously, shall be subject to a fine of not exceeding $1,000 nor less than $500, or not exceeding three nor less than one year's confinement in the penitentiary of the District of Columbia for every such offence.

SECT. 8. *And be it further enacted*, That all acts or parts of acts inconsistent with this be, and the same are, hereby repealed.

SECT. 9. *And be it further enacted*, That the cities of Washington and Georgetown respectively shall have power to establish a complete system of sewerage in aid of the execution of the provisions of this act.

Approved, March 3, 1859.

Appendix.

AN ACT GIVING THE CONSENT OF THE LEGISLATURE OF THE STATE OF VIRGINIA TO THE PURCHASE OF LANDS BY THE UNITED STATES FOR THE WASHINGTON AQUEDUCT, AND CEDING JURISDICTION OVER THE SAME.

Passed March 3, 1854.

Whereas, The Congress of the United States have appropriated the sum of one hundred thousand dollars for the purpose of supplying the City of Washington with water, upon such plan as the President of the United States may approve; *and*, *whereas*, by a joint resolution of Congress, passed in September, 1841, it is provided that no public money shall be expended upon any land or site hereafter to be purchased for the United States, until the consent of the Legislature of the State in which the land or site may be shall be given to such purpose; *and*, *whereas*, it is also made the duty of the Secretary or Head of the proper Department to apply to said Legislature for a cession of the necessary jurisdiction over said lands; therefore

1. Be it enacted by the General Assembly of Virginia that the consent of this State be and hereby is given to the United States to purchase land necessary for an abutment and quarries for the construction of a dam across the Potomac river, above the Great Falls, not exceeding ten acres, and to exercise concurrently with the State of Virginia such jurisdiction over the same as may be necessary; *Provided*, however, that nothing in this Act shall be so construed as to affect in any manner the rights of any individual or incorporated companies within the limits of this State; *Provided*, however, the State of Virginia may resume jurisdiction thereof whenever the Federal Government shall cease to use it for the purposes of aiding in the supply of water to the said city, or whenever it may become necessary for the safety of the Commonwealth, or whenever the General Assembly shall think proper.

2. This Act shall be enforced from and after its passage.

124-5-81

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE GREAT FALLS MANUFACTURING Company
vs.
AUGUSTUS H. GARLAND, ATTORNEY-General of the United States, *et al.*
} No. 605.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE GREAT FALLS MANUFACTURING Company
vs.
AUGUSTUS H. GARLAND, ATTORNEY-General of the United States, *et al.*
No. 605.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF OF ARGUMENT FOR APPELLEES.

I.

Where the complainant has a plain, adequate, and complete remedy at law, there is no jurisdiction in equity. (Rev. Stats., §. 723); *Thompson* vs. *Railroad Company* (6 Wall., 137); *Dade* vs. *Irwin's Executors* (2 How., 383).

The plaintiff's bill alleges (Rec., p. 2):

> That the said company was and is possessed in its demense as of fee of a certain tract of land in Virginia known as the "Toulson tract," lying and being

on the Potomac River, at said Great Falls, and described and bounded as follows: Commencing at the northeasterly corner thereof, at the western boundary of Conn's Island; thence running southerly by said boundary of said Conn's Island and along the middle thread of said river to a point below said Great Falls; thence extending westerly about half a mile; thence northerly to a point opposite the point begun at; and thence easterly to the point begun at; containing 1,000 acres, more or less, with all the easements, rights of water, use, navigation, privileges, and fisheries thereunto appertaining and belonging.

(Rec., p. 15:)

And your complainant is informed and believes, and therefore avers, that although no notice of any taking has been given in the manner prescribed by law, and although no act has been done which would justify him in so doing, the Secretary of War, in the year 1883, by his servants and agents, wrongfully took possession of the lands of your complainant, claiming to have done so in behalf of the United States, in the State of Maryland and in Virginia, which land was not within any description made, surveyed, or traced by the Secretary of War, and has used said land for the purpose of constructing a dam along a portion of said land, across Conn's Island, and over said river to the Virginia shore, and has built a large portion of said dam, by means of his said servants and agents, without making any bulkhead in said dam, or any provision whatever by which your complainant can use any portion of the water for manufacturing or other valuable purposes, as was awarded by the arbitrators in their award as aforesaid in favor of your complainants, the dam to be constructed after the manner of plan A.

> And your complainant is informed and believes, and therefore avers, that the War Department of the United States has occupied said land with a force sufficient to prevent any opposition of your complainant to its acts and doings or the acts and doings of its servants, agents, and employés without a breach of the peace of the State of Maryland.

(Rec., p. 18):

> And your complainant is informed and believes, and therefore avers, that it is the purpose and intention of the defendants and those acting with and for them, to proceed with said work on said dam, and to take all the water of said river and a portion, not yet defined, of the land of your complainant, without any further payment or provision or action to enable your complainant to get its just rights other and different from that which was done and made by the former aforesaid Attorney-General and Secretary of War, their agents and servants.

These allegations are, substantially:

(1) The ownership of land in fee by complainants.

(2) A wrongful entry, taking, and holding possession by officers of the United States in 1883.

(3) A wrongful retention of the wrongful possession taken in 1883 by the defendants, who are the successors of the officers of 1883, on the 5th of May, 1885, the date of the filing of this bill.

The fact further appears from the bill that this alleged property of complainants is entirely unimproved for any purpose, except as improved by the United States. Under these allegations, if true, an action of ejectment is a clear, adequate, and complete remedy to obtain possession, and trespass would follow the removal of the plaintiffs

for all damage done. If the erection be harmful in its character, or a nuisance, after the possession should be secured by ejectment, the complainants could abate the dam, or modify it to suit their own judgment or convenience.

The bill alleges the defendants had, as mere trespassers, taken possession of this land and were erecting structures upon it. If these structures were of the nature of nuisances, still the jurisdiction in equity could not be sustained, for, while it is true that courts of common law and equity have concurrent jurisdiction in proceedings for the abatement of nuisances in some cases, yet those cases in which equity has jurisdiction are limited to such as show that irreparable damage or interminable litigation will ensue, or that the extraordinary powers of equity are necessary to preserve the property. Where none of these facts are averred directly, or such facts charged as show clearly that irreparable damage or interminable litigation will result to complainant if the defendant be not restrained, the right must first be settled by action at law.

In the case of *Parker* vs. *Winnipiseogee Lake Cotton and Woolen Company* (2 *Black.*, 545) the averments in the bill of the complainant embrace every substantial element contained in that of the complainant in this case, except an indirect allegation in this case of a cloud upon the title. In the opinion in the case cited, the limitations between redress by action at law, and in equity, is fully and carefully considered, and an exhaustive examination of the authorities bearing on it is presented. The bill was dismissed, and it was decided "that it was an insuperable objection to the relief prayed for that the appellant had not established his right by action at law." The indefinite

and inferential charge of a cloud upon the title (Rec., p. 13) is insufficient, and is not followed by any prayer for appropriate equitable relief on account thereof.

II.

If the bill did present a claim within the jurisdiction of a court of equity, there is no equity in the bill. The property of which the defendants took possession was taken, as is shown by the bill, in pursuance of an act of Congress of the 15th of July, 1882 (22 Stat. L., 168), the first section of which is herewith printed as Appendix A. The Record, page 13, avers—

> And your complainant is informed and believes, and therefore avers, that the proposed acquiring of water rights and land for the purposes of a dam, as the same is described in the published notice of the Attorney-General of the 20th of August, 1883, is not other and different but substantially the same as the dam A, the plan of which was submitted to arbitration, etc.

On Record, page 14, a portion of the advertisement referred to in the last quotatation is set forth as follows:

> In addition to acquiring to and for the United States (*sic*) any outstanding title to these lands at the Great Falls, it is also proposed to acquire all water rights implied in the possession of the same or needed for purposes contemplated by the act under which these proceedings are taken.
>
> The map of the surveys (in three tracings) required for the uses enumerated in the above-named act of 1882, chapter 294, may be seen at this Department by all claimants to any portion of said premises.

These averments show a map and survey were completed and duly advertised in conformity to the act of Congress, and that the map sufficiently set forth such information that the complainant understood what was to be taken. The bill (Rec., pp. 11 and 12) avers:

> And your complainant is informed and believes, and therefore avers, that when imperfect maps without survey had been traced, which were the only maps made of said lands shown to your complainant, the Secretary of War and the Attorney-General of the United States did not proceed to acquire to and for the United States the outstanding title to said land and water rights of your complainant, which said rights and title both the Secretary of War and the Attorney-General knew existed from information furnished them by your complainant, and your complainant offered to sell said land and water rights to the United States at a fair valuation, by appraisers, to be appointed mutually between the parties, which said offer was communicated to the Attorney-General of the United States by the president of the Great Falls Manufacturing Company soon after the passage of said act.

From this it appears the complainant saw and examined the maps, and fixed a price which they proposed to accept, which is the next step in order required under the statute. The bill (Rec., p. 15) avers the application for an appointment of appraisers as follows:

> And your complainant is informed and believes, and therefore avers, that the Attorney-General, although he applied to the Chief Justice for the appointment of three persons to act as appraisers, as provided in said act, did not give them any description of any tract of land, the ownership of which is

> claimed severally, belonging to your complainant, that said appraisers might fairly and justly value the same, or any water rights, or intimation of water to be taken; nor did said appraisers value either land or water rights belonging to your complainant, nor has any amount been offered to your complainant therefor.

That portion of this averment which alleges the Attorney-General had not given the appraisers appointed sufficient information to enable them to intelligently dispose of the case is immaterial; for it does not follow that he may not do so in future, nor that the complainants will not, when it comes to be heard, give the necessary information.

These quotations shows that the bill alleges the Government was proceeding in the regular and orderly way by condemnation, according to the terms of the statute, to obtain title and afford the complainants compensation for any loss it might have been subjected to. The statute further provides in case the Government failed to condemn, or if for any other reason did not provide for making compensation, a remedy by which the claimant could have full redress for any wrong that might be done it, by the following clause:

> Any person or corporation having any estate or interest in any of the lands embraced in said survey and map who *shall for any reason* not have been tendered payment thereof as above provided, or who shall have declined to accept the amount tendered therefor, and any person who, by reason of the taking of said land, or by the construction of the works hereinafter directed to be constructed, shall be di-

> rectly injured in any property right, may, at any time within one year from the publication of notice by the Attorney-General as above provided, file a petition in the Court of Claims of the United States setting forth his right or title and the amount claimed by him as damages for the property taken or injury sustained; and the said court shall hear and adjudicate such claims in the same manner as other claims against the United States are now by law directed to be heard and adjudicated therein: *Provided*, That the court shall make such special rules in respect to such cases as shall secure their hearing and adjudication with the least possible delay.

The bill alleges that within the time limited after publication of notice in the above-quoted clause of the statute, the complainant presented its petition in the Court of Claims to recover compensation for the very acts done by the officers of the Government as set forth in the bill (Rec., p. 15). The clause "any person or corporation who shall *for any reason* not have been tendered payment therefor as above provided, or who shall have declined to accept the amount tendered therefor" is amply broad to secure the complainant redress for any and every wrong alleged in its bill.

The first section of the act of the 15th of July, 1882, fully establishes the remedy and mode of procedure to compensate all property-owners for any lands taken in the construction of the works provided for in the act, as stated in the bill of the complainant, and, in the language of the case of *Arnson* vs. *Murphy* (109 U. S. R., 243), "Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive." The complainant there-

fore can not lawfully ask redress in a court of equity, but must pursue the remedy provided in the statute. Provision having been fully made in the statute for compensation, and proceedings having been begun under the statute both by the Government and the complainant, to adjust and secure the payment of the compensation, the Government, by its officers, were authorized, upon the publication of notice, to take possession and proceed with the construction of the works by the following clause of the act:

> Upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map, and proceed with the constructions herein authorized; and upon payment being made therefor, or, without payment, upon the expiration of the times above limited without the filing of a petition, an absolute title to the premises shall vest in the United States.

As has been already shown, the bill avers notice, the averment having been connected with the additional allegation that the notice was defective. The alleged defect in the notice is want of sufficient specification; but an examination of a portion of the notice quoted in the bill shows that it referred to maps and plans open to claimants for examination with reference to the act,—certainly much more fully than a summons in an action at law sets forth the cause of action. (In the plaintiff's brief (Appendix, p. 16) the copy of the notice is set out, which we submit is amply full. But even if the summons is defective, if the defendant appears, the appearance waives defect of notice to appear, and claim or defend. The

claimants in this bill did appear, examined the maps, and presented their petition in the Court of Claims, which estops them from alleging they had not proper and sufficient notice of the proceedings.

III.

The complainant avers the whole proceeding is void because the act of Congress is unconstitutional.

> First, because said act "makes no provision by which reasonable compensation for the property taken for public use under its provisions can be constitutionally and lawfully adjusted and determined."

In reply to this, the act provides for a commission, which, as will appear hereafter, is, and was at and prior to the adoption of the Constitution, a well recognized mode of ascertaining the compensation to be paid by the Government for property taken in the exercise of the power of eminent domain. The act also provides, that if for any reason a claimant is not secured his compensation by commission, he is granted the full right to bring suit in the Court of Claims for adjustment and judgment, and full power is conferred on the Court of Claims to make special rules for hearing and speedy adjudication.

> Second. It is not provided that the compensation in its amount shall be ascertained by the verdict of a jury, which is a constitutional right of your complainant.

The reply to this is, the right of eminent domain is an inherent attribute of sovereignty, not granted by the Constitution, but its exercise limited by it. The life of the

nation may be dependent upon its exercise. In cases of emergency, delay might involve ruin. The limitation is that private property shall not be taken for public use without just compensation. When just compensation is provided for, the limit fixed by the Constitution is fully met. The limitation as to how the adjustment shall be determined is not confined to a trial by jury. Due process of law in such cases is accorded when the claimant has sufficient notice before hearing, has full opportunity to be heard before an intelligent, impartial tribunal, and fair investigation and a judgment as to his compensation.

The third and fourth grounds alleged by the complainant are (Rec., p. 17):

> 3. The act has provided that whatever wrong and injury may be done to your complainant in carrying on this public work, and in taking its land and water for such purposes of public use, that the only tribunal to which your complainant is compelled to have recourse for the adjudication of its rights is the Court of Claims, which is a court unknown to the Constitution, being neither a court of equity such as was known to our ancestors at the time of the ratification of the Constitution, nor a court of common law, as said court does not proceed, by its constitution, in the determination of cases according to the rules of the common law as known and practiced at the time aforesaid.
>
> 4. That said Court of Claims is not other and different from a board of referees constituted by one party to hear and determine such cases as another party will consent to submit to judgment thereby, and even such judgment is not authoritative or binding against the party that chooses the board of ref-

> erees. In addition to this said act makes a limitation on the power of the referees to enforce any judgment against the United States, because it enacts that judgment of these referees to whom the act compels those whose property is taken for public use alone to resort shall be paid as other judgments of said board of referees are to be paid, only when the judgment debtor pleases to pay them—*i. e.*, pleases to make an appropriation for that purpose.

It is immaterial whether the Court of Claims is or is not a court unknown to the Constitution. The United States, as a sovereign, could not, without their consent, be sued in any court known or unknown to the Constitution. Hence when the Government consents to be sued, the power may be subject, as a condition of the grant, to limitation as to the tribunal before which the suit may be brought, and the terms and manner in which it shall be conducted. This view is enforced in the language of the court in the case of *McElrath* vs. *The United States* (102 U. S., 440):

> There is nothing in these provisions which violates either the letter or spirit of the seventh amendment. Suits against the Government in the Court of Claims, whether reference be had to the claimant's demand, or to the defense, or to any set-off or counter-claim which the Government may assert, are not controlled by the seventh amendment. They are not suits at common law within its true meaning. The Government can not be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits.

It is also immaterial, in the exercise of the power of eminent domain, whether the Court of Claims be regarded

as a court or a mere appraiser, as either would be due process of law to determine the compensation for property taken in the exercise of the right.

The fifth reason assigned by the complainant is—

> In this, that the act directs property to be taken and entered upon, and the owner dispossessed therefrom, without any provision by which the compensaton for taking said property can be paid; and this is done when neither the act nor the surrounding facts show any need of haste in so doing or any necessity which requires that property be taken until after an appropriation at least has been made for compensation for so doing.

The act provides for an adjudication of the compensation. The solvency and justice of the nation are sufficient provisions to insure the payment of the judgment when the right is exercised directly by the sovereign. The payment of the compensation need not precede the taking possession. The principle is thus stated, and sustained by reference to abundant authorities, in Cooley's Constitutional Limitations, section 560:

> When the property is taken directly by the state, or by any municipal corporation by state authority, it has been repeatedly held not to be essential to the validity of the law for the exercise of the right of eminent domain that it should provide for making compensation before the actual appropriation. It is sufficient if provision is made by the law by which the party can obtain compensation, and that an impartial tribunal is provided for assessing it. The decisions upon this point assume that when the state has provided a remedy by resort to which the party can have his compensation assessed, adequate means

> are afforded for its satisfaction, as the property, municipality, or state is a fund to which he can resort without risk of loss. (*Vide* also Mills on Eminent Domain, section 126; also Potter's Dwarris on Statutes, page 391.)

Congress has by the act decided upon the emergency and necessity for the immediate exercise of the right. The power to decide upon these questions is necessarily vested in the legislative power, not subject to revision by any one. (*Secomb* vs. *Railroad Company*, 23 Wall., 118.)

The general principles above referred to in reply to the objections of the claimant to the constitutionality of the act of Congress are sustained by this court. In the case of *The United States* vs. *Jones* (109 U. S., 518, 519) it is declared—

> The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent Government. It is an incident of sovereignty, and as stated in *Boom* v. *Patterson* (98 U. S., 403), requires no constitutional recognition. The provision found in the fifth amendment to the Federal Constitution and in the constitutions of the several States for just compensation for the property taken is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised.
>
> It is undoubtedly true that the power of appropriating private property to public uses vested in the General Government—its right of eminent domain, which Vattel defines to be the right of disposing, in case of necessity and for the public safety, of all the wealth of the country—can not be transferred to a State any more than its other sovereign attributes; and that

when the use to which the property taken is applied is public, the propriety or expediency of the appropriation can not be called in question by any other authority. But there is no reason why the compensation to be made may not be ascertained by any appropriate tribunal, capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power.

The proceeding for the ascertainment of the value of the property and consequent compensation to be made is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon.

In the case of *Kohl* vs. *The United States* (91 U. S., 375. and 376) the following language is used by the court:

Doubtless Congress might have provided a mode of taking the land and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertaining of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the circuit court. * * * The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior

to any statute. That it was not enforced through the agency of a jury is immaterial, for many civil as well as criminal proceedings at common law were without a jury.

This case further rules the consent of the State to the appropriations is not necessary. (Vide also *The United States* vs. *The Great Falls Manufacturing Company*, 112 *U. S.*, 645).

G. A. JENKS,
Solicitor-General.

APPENDIX A.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War shall cause to be made a survey and map of the land necessary to extend the Washington Aqueduct from its present eastern terminus to the high ground north of Washington near Sixth street extended, and of the land necessary for a reservoir at that point the capacity of which shall not be less than 300,000,000 gallons; and a like survey and map of the land necessary for a dam across the Potomac River at the Great Falls, including the land now occupied by the dam, and the land required for the extension of said dam across Conn's Island to and upon the Virginia shore; and when surveys and maps shall have been made the Secretary of War and the Attorney-General of the United States shall proceed to acquire to and for the United States the outstanding title, if any, to said land and water-rights, and to the land on which the gate-house at Great Falls stands by condemnation.

And in obtaining title to the right of way for the extension of said aqueduct, the Secretary of War and the Attorney-General may, in their discretion, secure title to a strip suitable for an avenue over such part of said aqueduct extended as they think proper: *Provided*, That at least one-half in value of such right of way shall be donated or dedicated by the owners to that public use: *And provided further*, That if it shall be necessary to resort to condemnation, the proceeding shall be as follows:

When the map and survey are completed, the Attorney-General shall proceed to ascertain the owners or claimants of the premises embraced in the survey, and shall cause to be published, for the space of thirty days, in one or more of the daily newspapers published in the District of Columbia, a description of the entire tract or tracts of land embraced in the survey, with a notice that the same has been taken for the uses mentioned in this act, and notifying all claimants to any portion of said premises to file, within its period of publication, in the Department of Justice, a description of the tract or parcel claimed, and a statement of its value as estimated by the claimant. On application of the Attorney-General, the chief justice of the supreme court of the District of Columbia shall appoint three persons, not in the employ of the Government or related to the claimants, to act as appraisers, whose duty it shall be, upon receiving from the Attorney-General a description of any tract or parcel the ownership of which is claimed separately, to fairly and justly value the same and report such valuation to the Attorney-General, who thereupon shall, upon being satisfied as to the title to the same, cause to be offered to the owner or owners the amount fixed by the appraisers as the value thereof, and if the offer be accepted, then, upon the execution of a deed to the United States in form satisfactory to the Attorney-General, the Secretary of War shall pay the amount to such owner or owners from the appropriation made therefor in this act.

In making the valuation the appraisers shall only consider the present value of the land without reference to its value for the uses for which it is taken under the provisions of this act.

The appraisers shall each receive for their services $5 for each day's actual service in making the said appraisements.

Any person or corporation having any estate or interest in any of the lands embraced in said survey and map

who shall for any reason not have been tendered payment therefor as above provided, or who shall have declined to accept the amount tendered therefor, and any person, who by reason of the taking of said land or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may, at any time within one year from the publication of notice by the Attorney-General as above provided, file a petition in the Court of Claims of the United States setting forth his right or title and the amount claimed by him as damages for the property taken or injury sustained; and the said court shall hear and adjudicate such claims in the same manner as other claims against the United States are now by law directed to be heard and adjudicated therein: *Provided*, That the court shall make such special rules in respect to such cases as shall secure their hearing and adjudication with the least possible delay.

Judgments in favor of such claimants shall be paid as other judgments of said court are now directed to be paid; and any claimant to whom a tender shall have been made, as hereinbefore authorized, and who shall have declined to accept the same, shall, unless he recover an amount greater than that so tendered, be taxed with the entire cost of the proceeding. All claims for value or damages on account of ownership of any interest in said premises, or on account of injury to a property right by the construction of said works, shall, unless a petition for the recovery thereof be filed within one year from the date of the first publication of notice by the Attorney-General as above directed, be forever barred: *Provided*, That owners or claimants laboring under any of the disabilities defined in the statute of limitations of the District of Columbia may file a petition at any time within one year from the removal of the disability.

Upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map, and proceed with

the constructions herein authorized; and upon payment being made therefor, or, without payment, upon the expiration of the times above limited without the filing of a petition, an absolute title to the premises shall vest in the United States.

○

124-581

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1886.

No. 960.

THE GREAT FALLS MANUFACTURING COMPANY, APPELLANT,

v.

AUGUSTUS H. GARLAND, ATTORNEY-GENERAL OF THE UNITED STATES, *et als.*

MOTION BY THE APPELLANT TO ADVANCE THE CAUSE.

And now comes the appellant and moves the Court here for leave to have this cause advanced and heard at such early day at the present term as the Court may select, and for reasons why said cause should be advanced, among others it assigns the following considerations: —

STATEMENT OF THE CASE.

This bill in equity was brought in the Circuit Court of Maryland to remove a cloud upon the title to the lands and water-power of the complainant in the State of Maryland, and to prevent its lands and property from being illegally taken from its possession and use, against the Attorney-General and the Secretary of War of the United States, who are by the Act of Congress, passed July 15, 1882, Chapter 294, entitled "An Act to Increase the Water Supply of the City of Washington, and for other purposes," made a commission on behalf of the United States to "acquire title," and, "if necessary," to proceed to the condemnation of such lands as may be deemed necessary for the purposes of said Act for the use of the United States, and the United States and their agent have taken possession of the land and water described in said bill. The other defendants are their agents, contractors, and servants in doing the work.

It is admitted by the demurrer that no preliminary steps re-

quired by the Act were taken in regard to these lands before they were taken possession of by the United States, and which are conditions precedent to any application to be made to the Court of Claims by the complainants for remuneration, if it is incumbent upon them so to do.

There are a great many pieces of land and water rights which are in the same condition as that of the complainants'. The time limited in which an appeal to the Court of Claims could be made by said Act, after such preliminary proceedings had been taken, expired on the 22d day of August, 1884, no act having been done by the Attorney-General and the Secretary of War in regard to taking these lands until August 21, 1883, more than thirteen months after the passage of the Act. By its provisions "all claims for value or damages shall, unless a petition for the recovery thereof be filed within one year from the date of the first publication of a notice prescribed in the Act by the Attorney-General, as above directed, be forever barred." (Rec., pp. 10–11.) As alleged in the bill, no such notice was published.

In response to a resolution of the Senate, passed January 20, 1885, making inquiry as to the proceedings of the Attorney-General and Secretary of War under this Act, the Attorney-General wrote a letter, in which he states that no action had been taken "in the case of the Great Falls Manufacturing Company's claim, as questions of law were involved, and it was deemed impossible, without the examination of numerous witnesses, to arrive at the value of the land to be taken, exclusive of the uses for which it was to be taken, and exclusive of the injury to be wrought by the taking upon other property and rights of the claimant, and an ample remedy was afforded by the Statute by resort to the Court of Claims." (Rec., p. 30; 49.)

If, as therein stated, "no claim had been made by the Great Falls Company," their remedy in the Court of Claims had expired nearly two months previous to that date; and, therefore, the statement that an ample remedy was afforded by the Statute by resort to the Court of Claims, seems to have been quite inaccurate.

We are fortified in saying that the statement was inaccurate, because in the same letter the Attorney-General says: "Five of the claimants, to wit: the Great Falls Manufacturing Company, the

Chesapeake and Ohio Canal Company, Evan Lyons, Frederick Wetzel, and the Howard University, availed themselves of this remedy, and as to these no doubt has been felt that the Attorney-General became on the 22d August *functus officio*. A greater number, who, for some reason or other, had not been tendered payment, failed to file their petitions in the Court of Claims, and unless Congress relieves them they are remediless." (Rec., p. 27.)

And in the same letter (Rec., p. 32) he states: —

"In view of the provisions of the Statute opening the Court of Claims to any one who for any reason had not been tendered payment, and forever barring those who did not present their claims within one year from the date of publication, and vesting in the United States an absolute title where no petition has been filed, I have not felt authorized to tender payment or to take any steps since the 21st of August, 1884. I am led to believe that many, if not all the claimants above recited who failed so to present their claims, were not cognizable by the appraisers. It became evident as the close of the year designated by the Statute approached, that the work of appraisement, examination of titles, and removal of incumbrances would occupy more than the allotted time, and on the 21st June, 1884, I addressed you a communication, a copy of which is hereto annexed."

Further he says: —

"The work of appraisement has been accomplished, but the last report was made so near the 21st of August as to give the claimants very inadequate opportunity to examine the report and comply with the Statute." (Rec., p. 32.)

He therefore renews a recommendation that the time should be extended. In pursuance of that recommendation Congress passed the following Act, February 26, 1885: —

"*Be it enacted, etc.*, That the time fixed by the Act entitled "An Act to Increase the Water-Supply of the city of Washington, and for other purposes," approved July 15, 1882, within which owners or parties interested in lands condemned or taken under the provisions of said Act may accept the appraised value made or to be hereafter made under said Act, or owners or persons interested in such lands who have declined or may hereafter decline to accept the appraised value of such lands, and have elected or may elect to file a petition in the Court of Claims, under the provisions of said Act, be, and the same is hereby extended for one year from the passage of this Act, notwithstanding the limitation provided by said Act."

The plaintiff filed its petition in the Court of Claims and stated therein that it was *ex majore caudelâ* to save limitations, and alleging that nothing had been preliminarily done.

We believe sufficient has been stated to give the Court an understanding of the conditions of fact necessary to be understood for the purposes of the consideration of this motion.

In order to get the very important and grave questions of law and constitutional requirement settled, the bill of the complainant was very carefully drawn, setting out all the facts necessary to the adjudication of the complainant's rights, and of the rights of a great many others who are in like case and condition. That the complainant was successful in properly setting out such facts, and all of them necessary to the determination of these great questions, is shown by the fact that the learned defendants chose to have the case of the Government heard upon demurrer, which, of course, would not have been done if the statement of facts was in material part inaccurate or even unsatisfactory.

The defendants objected to the jurisdiction of the Circuit Court; which objection the record shows was heard and determined against them, from which judgment they did not appeal, for reasons which would undoubtedly be satisfactory to this Court if here, and now, was the occasion for presenting them.

The case is, in fact, one against the United States presenting questions concerning vital interests of the United States in regard to a large amount of property, and of great consequence to those whose property has been taken, and if not heard and examined at an early day, the time will have passed in which, if decided adversely, the claimants, and those situated in like condition, can bring, if they ever can, their cases before the Court of Claims.

Again; if this case is not heard and determined at the present term, and has to await its turn, being No. 960, some three years hence, it will amount to a substantial denial of justice, because the officers at the time of judgment in such case may not be, and in the usual course of events probably will not be, Attorney-General and Secretary of War. Certainly they will have to be reappointed. Besides, during such length of time the Company will be, of necessity, deprived of all use of its water-power and land.

Again; the adjudication of the questions raised by this bill will determine the law applicable to a large class of cases which will have

to be brought and argued in the Court of Claims, and many of them will come up here to be tried in various forms before the Court, taking more time of the Court than would be required to settle them now, and so all the principles being settled, much expensive and tedious litigation will be avoided.

Again; we pray the Court not to be influenced or misled by any claim that this complainant of all others has a full and adequate remedy in the Court of Claims. One special gravamen of our complaint to be determined in this case, as fully set out in the bill, is, whether the United States, having heretofore through its highest officers entered into an arbitrament as to the title of the complaintant to the lands and water-power in the question which has been sustained not only by the Court of Claims but by this Court, and the complainant awarded damages in accordance therewith. The United States are not obliged to abide by and perform such award. When the United States did, in 1867, take the lands of the complainant and erect a dam by which their water was diverted by one of the four separate forms of such four separate plans set forth in such award; and the United States having taken a portion of such water under one plan which permitted the erection of a dam over one branch of the Potomac river, and now being about, as the bill alleges, to construct a dam substantially according to another plan which was passed upon by the arbitrators, and as to which they found in case the United States should erect such a dam, the award gave a sum in damages.

This dam being now erected according to such plan extends wholly across the river so as to take a very largely increased supply of water. And the award finding that in such case, in order to full and just relief to the complainant in addition to paying the sum awarded, the United States should make provision on the ground by which the complainant could utilize such portion of the water as should overflow the dam, as the United States could neither hold nor take from them by said dam — it is claimed in the bill that the United States ought to be held to a *specific performance of such award* according to its terms by making provision to carry out the conditions of the award which finds this was just, necessary, and adequate as compensation for the injury done the complainant by a taking in such form.

It is now submitted that it is more than doubtful whether the Court of Claims has any jurisdiction to adjudge, determine and decree the specific performance of an award against the United States, or a contract by the United States calling for specific acts to be done in specie, as indemnification to its petitioner.

It is difficult to see what form of judgment the Court of Claims could give; what writ of execution, or writ "in aid" or assistance of a Court of Equity which is within the power of a Court of Equity, but not a process of a Court which has no equity jurisdiction, and which by the statute is only empowered to adjucate what sum in money the United States owes upon a contract express or implied.

The plaintiff in this case would much more value the right to use, and the means by which it can use, the surplus water which the Government does not want, and cannot hold back by their dam, than any amount of damages which could justly be given against the United States for water taken.

Let it not be said that the complainant can use this water after it flows over the dam of the United States. One great difficulty is that the United States in taking water, under the terms of their publication, not only took all the water, but took, also, such land of the complainant out of a thousand and more acres that the complainant owned, to an extent that the complainant cannot, without inordinate and unprofitable expense, reach the water after it flows over the dam.

We pray the Court, therefore, before the question of any possible remedy in the Court of Claims shall be examined, or have influence upon the determination of this motion to advance the cause, to hear the complainant upon these questions which can only be determined, we desire to submit, after full and careful presentation.

It is believed the Attorney-General agrees with the complainant that the questions raised by this bill are very important for the interests of the United States to be at once determined, so that the other cases pending may be properly and justly adjudicated and settled, and will, therefore, agree with the complainant in this motion for advancement of this cause by the Court.

All which is respectfully submitted.

BENJ. F. BUTLER,
Of Counsel for Complainant.

Copy.

Dept. of Justice,
Dec^r. 7 4/86.

I have examined this motion, and I am of opinion the matters and things involved are of sufficient importance to the Government and the public to authorize an advancement of the Case.

A. H. Garland,
A G.